***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

Docket No. [redacted]
74-2170

ITES STATES CIRCUIT COURT OF APPEALS
OR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

-against-

JAMES MITCHELL,

Appellant.

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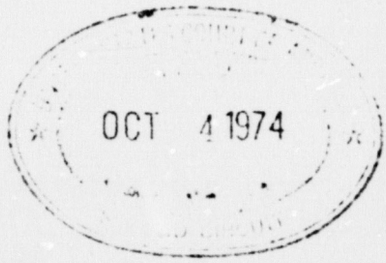


# APPENDIX

[redacted] OF THE APPELLANT

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STEIN and LaGRECO, P.C.
Attorneys for Appellant
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Received appendix
10-4-74
9:30 a.m.
J. Hermann
Joint Strike Force

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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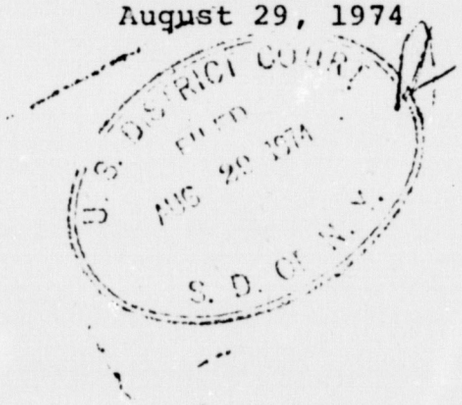
| UNITED STATES OF AMERICA | Before: |
| | HON. RICHARD OWEN, |
| vs. | District Judge. |
| JAMES MITCHELL, | |
| | 74 Cr. 265 |
| Defendant. | |

New York, July 1,2,3,1974
August 29, 1974




STENOGRAPHER'S MINUTES

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA | |
| vs. | 74 Cr. 265 |
| JAMES MITCHELL, | |
| Defendant. | |

Before:

HON. RICHARD OWEN,
District Judge.

New York, July 1, 1974;
10.00 o'clock a.m.

APPEARANCES:

PAUL J. CURRAN, Esq.,
United States Attorney for the
Southern District of New York;
By: CHARLES PADGETT, Esq.,
Special Assistant United States
Attorney, of Counsel.

WILLIAM C. SHERR, Esq., and
WILLIAM J. WERNER, Esq.,
Attorneys for Defendant.

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MR. SHERR: If your Honor please, I would like to beg your Honor's indulgence for five minutes so I can talk to my client. I haven't had a chance to speak to him yet.

THE COURT: All right, five minutes.

(Recess.)

(Case called.)

THE CLERK: Both sides ready for trial?

MR. PADGETT: Government ready.

MR. SHERR: Defendant is ready.

THE COURT: All right, Mr. Padgett.

Who is the first witness?

MR. SHERR: I would like to inform the Court, if I may, for the record and just for the preservation of my client's rights, that I did come here from a sick bed. I have been confined to bed for the last week, and presently this morning I have already taken a Donatol, a Valium, and a codeine with Emperin, and I am prepared to proceed under those circumstances, but I wanted your Honor's indulgence in understanding that I am not well at the moment.

THE COURT: Mr. Sherr, let me say this -- sit down, sir, you don't have to stand -- over a month ago an adjournment was obtained on the basis that Mr. Werner was going to try the case, and there was some colloquy between

me and one of your colleagues in that Mr. Werner was, I believe, in your office, and I wanted to set the trial down for the first day he got back from Europe, and we had some give and take on that. I finally gave a week's extension beyond Mr. Werner's return from Europe so he could properly prepare for trial.

On Thursday of last week, when a representation had been made that time was needed because you were going to try it, I had the minutes read to me by the court reporter to establish the fact that Mr. Werner was going to try it, and having ascertained that the minutes were as I remembered them, and a phone call from one of my clerks to Mr. Werner elicited a response from Mr. Werner that he would indeed be ready to try the case starting today; so I am glad to see that Mr. Werner is here in court, and between the two of you I am sure Mr. Mitchell will get good representation; and Mr. Padgett, would you call your first witness?

MR. PADGETT: Yes, your Honor.

Your Honor, at this time I would ask all the Government's witnesses to stay in the witness room, and I would ask the defense to exclude from the courtroom all its potential witnesses.

THE COURT: Yes, I so direct, that any witness

mbs

for either side please attend in the witness room.

MR. PADGETT: Mr. Werner, Mr. Sherr, your Honor, may it please the Court:

Your Honor, this is in the nature of a brief opening statement, if I may be permitted.

THE COURT: By all means.

MR. PADGETT: I will be brief since the defendant has waived a jury herein.

This, as your Honor knows, of course, is a tax case, one in which the defendant is charged in a two-count indictment with violation of 26 U.S.C. 7201, tax evasion, and 26 U.S.C. 7203, failure to file income tax return, each of those acts allegedly occurring in 1971. I should say a crime occurring in '71, the failure to file, of course, occurred some time after the filing date in April of 1972.

The Government will establish its case by calling a series of approximately 14 witnesses. The witnesses will testify to, in the first group, the records search made by them as employees of the United States Government, and their inability to find any records of the United States Government, the income tax returns, any income tax returned filed by the defendant.

They will also testify as representatives of New York State, the fact that they searched the income tax

records of New York State and were unable to find tax returns filed by the defendant for New York State.

We will also have a witness from the Social Security Administration who will testify that the records of the Social Security Administration do not disclose any withholding tax or any Social Security payments by the defendant during the year in question, 1971.

There will then be a series of witnesses who will testify to certain background information to enable your Honor to conclude that the defendant's failure to file was indeed a wilful evasion of the taxes. These witnesses will testify to the use of aliases by the defendant, to the use of a corporate shell, and to the use of a general pattern of evasiveness designed, it is the Government's position, to avoid the payment of taxes due and owing.

There will then be the third category of witnesses who will testify to direct payments made, direct cash payments made to the defendant during the year in question, and more importantly, will testify that these payments were made in the course of a business arrangement.

On the conclusion of all the Government's testimony, the Government not only feels that a prima facie case will have been established, but the defendant's guilt on each of the counts of the indictment will have been proven

beyond a reasonable doubt.

Thank you very much.

MR. SHERR: If your Honor please, I will waive an opening statement, but I would like to save the Court's time. I think we can do away with the first category of witnesses. Defendant is prepared to concede that no tax returns were filed in the year 1971.

THE COURT: Mr. Padgett, is that --

MR. PADGETT: Well, your Honor, there will be a number of stipulations offered to the defendant. If we might have a moment now that Mr. Sherr is here to discuss these stipulations, perhaps we could expedite the procedure and clarify matters a bit further, if we may have the Court's indulgence.

THE COURT: Why don't you do that right now. I will stay right here.

(Pause.)

MR. SHERR: Your Honor, may we approach the bench?

THE COURT: Surely.

(Discussion off the record.)

THE COURT: Let the record show that at the bench we have had a discussion, and Mr. Scherr is agreeable to signing a stipulation as to failure to file in the year in

question, and one year on either side of the year in question.

MR. PADGETT: At this time the Government calls Vincent Ferguson to the stand.

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V I N C E N T T H O M A S F E R G U S O N , called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PADGETT:

Q Mr. Ferguson, by whom are you employed?

A Plaza Management Company.

Q Can you tell us the business of Plaza Management Corporation?

A They manage real estate.

Q Is one of the buildings that Plaza Management manages an apartment building located at 145 Fourth Avenue in Manhattan?

A That's correct, sir.

Q Can you describe that building, sir?

A Can I describe it? It's a luxury apartment building, has approximately, I'd say, 142 tenants. It goes 13 stories, 19 stories.

Q Can you tell us what your duties entail in your

employment by Plaza Management?

A I manage not only 145 Fourth Avenue but quite a few other buildings in Manhattan.

Q What do you mean when you say you manage? What do you do?

A I okay all the purchasing, I hire, fire, I in general manage all the business of the building.

Q Are you familiar with the leases executed on behalf of Plaza Management Corporation?

A Yes, I am, sir.

Q Approximately how many such leases have you seen?

A How many have I seen regarding 145 Fourth Avenue, or all the leases?

Q All of Plaza Management.

A It would have to be in the thousands.

Q How many leases have you seen, addressing yourself specifically to 145 Fourth Avenue?

A I couldn't tell you right offhand, but it would have to be in the hundreds.

Q I show you this sheaf of documents.

Do you recognize it?

A Yes, I do.

Q What do you recognize it to be?

A I recognize it to be a lease with Plaza Management for the building 145 Fourth Avenue, specifically Apartment 17-G.

MR. PADGETT: Would you mark this for identification as Government's Exhibit 1.

(Government's Exhibit 1 was marked for identification.)

Q Mr. Ferguson, you said that this is a lease for a certain apartment building at 145 Fourth Avenue; is that correct?

A That's correct, sir.

Q Is that lease similar to other such leases entered into on behalf of Plaza Management Corporation?

A Yes.

Q This is similar then to the leases you say you have seen on hundreds of occasions?

A Yes, it's a standard real estate Plaza Management lease.

Q Do you know if that lease was prepared in the ordinary course of business by Plaza Management?

A I assume it was.

Q Does that appear --

MR. SHERR: I object to that.

THE COURT: Yes, strike it out.

Q I ask you to examine the lease, sir, and tell us if you can notice anything different between that lease, Government's 1 for identification, and the hundreds of leases that you have seen entered on behalf of Plaza Management.

MR. SHERR: Objection, your Honor. The fact that he may or may not be able to notice anything different between this lease and other leases doesn't prove it was prepared in the regular course of business.

THE COURT: I don't think that is what he is offering it for.

MR. PADGETT: Not through this question.

THE COURT: Not with this question.

MR. SHERR: Then I object on the ground it has no bearing on this case.

THE COURT: I will overrule the objection.

Go ahead.

Mr. Ferguson, you say there is a standard real estate form of lease that you use; is that right?

THE WITNESS: Yes, that's correct.

THE COURT: The question to you is, how does this differ from the standard form that you use?

THE WITNESS: This does not differ.

Q Can you tell us for which apartment that lease

is, sir?

A Apartment 17-G.

Q Can you tell us for what years that lease covers?

A This one covers from May 1, '69 to April 31, 1971.

Q Can you tell us between whom the lease was entered?

A Between Charles Dunbar and Plaza Management Company.

Q I show you this sheaf of documents. Do you recognize it?

A Yes, I do.

Q What do you recognize it to be?

A A lease between Plaza Management Company and Charles Dunbar.

Q What premises, sir?

A 145 Fourth Avenue, New York City, Apartment 17-G to be specific.

Q For what period of time, sir?

A May 1, '71, 31 April '73.

MR. PADGETT: I offer this as Government's 2 for identification.

(Government's Exhibit 2 was marked for identification.)

xx

Q Is Government's Exhibit 2 essentially similar to the hundreds of leases entered into in behalf of Plaza Management Corporation which you have seen?

A Yes, sir, it is.

Q Is it indeed a standard form lease?

A Yes, it is.

Q Mr. Ferguson, can you tell us during the period 1971 what was the rental charged for Apartment 17-G at 145 Fourth Avenue?

A 1971? $320 per month.

Q Mr. Ferguson, I show you this document.

Do you recognize it?

A Yes, I do.

Q What do you recognize it to be?

A I recognize it to be a bookkeeping card and a record of payment for Apartment 17-G, 145 Fourth Avenue.

Q Is that the original card, sir?

A Yes, it is.

MR. PADGETT: I offer this as Government's Exhibit 3 for identification.

(Government's Exhibit 3 was marked for identification.)

xx Q Mr. Ferguson, can you tell us, during the year 1971, how payment was received for Apartment 17-G? In

what form was payment received?

A Cash payment.

Q Mr. Ferguson, how many similar documents to Government's 3 for identification have you seen?

A Thousands.

Q Have you indeed seen Government's 3 before, sir?

A Yes, I have.

Q When did you last see it prior to today, sir?

A Two weeks ago.

Q When was that, sir?

A I was asked to get a copy, you know.

Q What were the circumstances under which you last saw that document, sir?

A Upon request of, I think it was the Internal Revenue to bring it.

THE COURT: Where did you see it, Mr. Ferguson?

THE WITNESS: In our office, in Plaza Management's office.

Q Who removed that from Plaza Management Corporation?

A I did.

Q To whom did you give it?

A To the representaive of the Internal Revenue.

Q Directing your attention to Government's 1 and

2 for identification, when did you last see each of those documents?

A About two weeks ago.

Q I am sorry, sir.

A About two weeks ago.

Q Under the same circumstances, sir?

A Under the same circumstances.

Q You personally removed Government's 1, 2 and 3 from the records of Plaza Management Corporation?

A That's correct, sir.

Q And made them available to an agent of the Internal Revenue Service?

A That's correct, sir.

Q Are Government's Exhibits 1, 2, and 3 for identification records prepared in the ordinary course of business by Plaza Management?

A Yes, they are.

Q Is it the ordinary course of business for Plaza Management to prepare such records?

A Yes, it is.

Q Is it the ordinary course of business for Plaza Management to make entries on those records on the dates that the records themselves bear?

A Yes, it is.

MR. PADGETT: Your Honor, at this time I would offer Government's 1, 2, and 3 for identification as 1, 2, and 3 in evidence.

MR. SHERR: May I have a voir dire for a moment, your Honor?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. SHERR:

Q Mr. Ferguson, did you prepare any of these leases?

A Did I prepare them? No, I didn't.

Q Were you in the employ of the company when they were prepared?

A Yes, I was.

Q Did you see them prepared?

A No, I did not see them prepared.

Q Do you know who prepared them?

A No, I don't.

Q All you know is that you found them amongst the records?

A Yes, they were among the records for 145 Fourth Avenue.

Q Are they originals or photostats?

A They are originals.

Q Is there anything on there that would indicate who prepared them in behalf of your management company?

A No, no, not at all.

Q Do you in fact know when they were prepared without referring to the date that appears on them?

A No, no, sir.

Q They could have been prepared a month ago with a date inserted, as far as you know?

A As far as I know they were prepared --

Q No, no, as far as you know, of your own personal knowledge, without guessing or inferring.

A I don't know.

Q You don't know when they were prepared, and you don't know by whom they were prepared?

A All I know is what the record reads.

Q You found them amongst the records when, two weeks ago?

A When I was requested -- when that request was submitted to me, I looked in the records, and this is what I found.

MR. SHERR: I object to them being offered in evidence, if your Honor pleases. No proof that these were prepared in the regular course of business. The witness first saw these documents two weeks ago. There

is no proof as to who prepared them, or whether or not the person preparing them had the authority to prepare them, or whether or not these are the actual companies that were prepared and kept in the regular course of business.

THE COURT: Mr. Sherr, let me ask a question before I rule on your objection.

Mr. Ferguson, take these leases, Nos. 1 and 2 for identification.

Would you look at the signature page, and you will find an initial there on behalf of the landlord.

THE WITNESS: Yes, sir.

THE COURT: Whose initials are those?

THE WITNESS: Looks like Anthony Michaels.

THE COURT: Have you seen those initials before?

THE WITNESS: Absolutely.

THE COURT: Have you seen Mr. Michaels make those initials on any occasion on a lease?

THE WITNESS: Yes, sir.

THE COURT: Do you recognize those as Mr. Michaels' initials?

THE WITNESS: Right.

THE COURT: You say these leases were obtained by you from the place in your place of business where leases are kept?

THE WITNESS: That's correct, your Honor.

THE COURT: And that is Mr. Michaels' initials there on behalf of the landlord?

THE WITNESS: Yes, sir.

MR. SHERR: May I, Judge?

THE COURT: Do you want to address yourself to the --

MR. SHERR: On those things.

BY MR. SHERR:

Q Mr. Ferguson, do you have any training in handwriting analysis?

A Not at all.

Q Did you ever make a study of handwriting?

A Never, sir.

Q Did you ever take any courses in handwriting?

A Never.

Q How many times have you seen the initials -- what are the initials, A.M.?

A Yes.

Q Have you reviewed the other leases for the premises involved?

THE COURT: I will sustain an objection to form as to that question.

Q Have you checked any of the other leases with

respect to the building involved in this lease?

A Have I ever checked them? Absolutely.

Q Have you looked at them recently?

A Absolutely.

THE COURT: Have you had occasion to look at them?

THE WITNESS: Other leases, absolutely.

Q Do you remember whether or not they were initialed or signed?

A Sure. If I look at lease, I want to see if it's executed by the landlord.

Q Do you remember the initials?

A Sure.

Q On each of those leases?

A They are either -- they are all signed by Michaels.

Q Hundreds of leases are all signed by the same man?

A Yes, sir, that's correct.

Q May I see that?

A Sure.

Q Whose signature is signed as witness to the landlord?

A This one here? Myron -- from what I can --

that's witness for tenant. Witness for landlord, you are talking about here -- this is Lawton, David Lawton. He is another officer of the corporation.

Q Do you know his signature?

A Yes, I do.

Q And you can identify his signature without comparing it to anything?

A Without comparing it to what?

Q To another specimen signature.

A I recognize the signature as Lawton's because I see it many, many times.

Q Whose signature is the signature who signed in behalf of the landlord?

A That's Michaels here, Michaels and Lawton.

Q This scrawl on top is Michaels'?

MR. PADGETT: Objection.

THE COURT: I will sustain the objection.

THE WITNESS: Yes, that is Anthony Michaels' signature as far as --

Q That is the same man who you say made the initials A.M. over here?

A That's right.

Q You are saying that the A in the initials A.M. is the same initial as the letter A in the signature?

A I am not saying --

MR. PADGETT: Objection, that is not what the witness said.

Q Are you saying the same person signed?

A Yes, I say this is his initials and this is his signature.

MR. SHERR: I would like to show your Honor the difference between the initials and the signature.

MR. PADGETT: Objection.

THE COURT: Overruled. We are dealing with Exhibit 1 for identification. The signature that Mr. Sherr is referring to is on the very last page, and I have observed what Mr. Sherr has shown me.

Go ahead.

MR. SHERR: I renew my objection on the ground that the witness has not established himself as capable of establishing a foundation of himself being capable of doing a handwriting analysis to determine the validity of a signature.

I also point out respectfully to the Court that there is a marked difference between the initials A.M. identified to be that of the same individual who supposedly signed the lease with the signature, the A and the M in the signature.

THE COURT: I will admit Exhibits 1 and 2 in evidence.

MR. SHERR: Respectfully except.

(Government's Exhibits 1 and 2 were received in evidence.)

xx THE COURT: Going to Exhibit 3 for identification, Mr. Ferguson, this is a ledger card.

THE WITNESS: Yes, it is.

THE COURT: You say you got it two weeks ago from the other ledger cards similarly kept in your office?

THE WITNESS: Yes, your Honor.

THE COURT: Do you have a bookkeeper or bookkeepers that do the posting?

THE WITNESS: That's correct.

THE COURT: Did you set up the system for them?

THE WITNESS: Yes, the system has been set up for many years.

THE COURT: You know what the system is?

THE WITNESS: Yes, I do.

THE COURT: What is the system that they use when they post the entries on exhibits such as 3 for identification?

THE WITNESS: Well, if something -- if moneys are received, they -- if it's a check, they are marked

"check". If the moneys that are received for rent payments are cash, it's marked "in cash".

THE COURT: And these are kept, according to your knowledge, by the girls under your instruction in the manner you have described?

THE WITNESS: That's right.

THE COURT: I will admit 3 for identification.

MR. SHERR: You are admitting it in evidence? I have the same objection in evidence, if your Honor please.

THE COURT: You may.

MR. SHERR: Respectfully except.

(Government's Exhibit 3 was received in evidence.)

xx MR. PADGETT: Your Honor, at this time may the record reflect that I am making available to counsel the original of an affidavit signed by this witness on the 28th of September 1973. I have no further questions.

THE COURT: The affidavit is in the nature of 3500 material?

MR. PADGETT: Yes, it is.

THE COURT: Have you marked it for identification?

MR. PADGETT: No. I will if your Honor desires.

MR. SHERR: Excuse me, I assume your Honor's overruling my objection to the admission of these leases is subject to connection with the defendant?

THE COURT: Without any question.

Mark that, please, as a 3500 exhibit so the record is clear.

(Goverhment's Exhibit 3501 was marked for identification.)

xx THE COURT: Mr. Sherr, do you want to cross-examine?

MR. SHERR: I have no questions.

THE COURT: All right, you are excused, sir. Thank you very much.

(Witness excused.)

MR. PADGETT: The Government calls Stephen Driscoll to the stand.

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S T E P H E N P. D R I S C O L L, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PADGETT:

Q Mr. Driscoll, by whom are you employed?

A New York City Police Department.

Q In what capacity, sir?

A As a police officer.

Q During 1971, sir, what was your residence?

A 145 Fourth Avenue, New York City.

Q Specifically, in which apartment, sir?

A 17-H.

Q Can you tell us where in relation to your apartment, apartment No. 17-G was?

A Directly adjacent.

Q During 1971 did you have occasion to speak with any of the occupants of Apartment 17-G?

A Yes, I have, several times.

Q were these male or female occupants, sir?

A Male.

Q Do you recognize any of those occupants here in court?

A I do.

Q Will you point them out, sir, if you do recognize them?

A That gentleman right there.

MR. PADGETT: May the record reflect the witness has indicated the defendant?

THE COURT: It may.

Q When did you first meet the defendant, sir?

A I first met -- talked to the defendant in the summer, August of 1982.

Q When you spoke to the defendant, did you address him by name?

A Yes, I did.

Q What name did you use, sir?

A Charles Dunbar.

Q Did he respond, sir?

A Yes, he did.

Q Did there come a time when you did not address the defendant as Charles Dunbar?

A Yes.

Q When was that, sir?

A January 17, 1973.

Q During the period August 1972 through January 1973, did you continue to address the defendant as Charles Dunbar?

A I did.

Q Did he continue to respond?

A Yes, he did.

Q How often would you so address him?

A Sometimes once, twice a week.

Q Where would you address him, sir?

A In the hallway of 145 Fourth Avenue, the residence, or at his door.

Q That would be which door, sir?

A 17-G.

Q Now, sir, I direct your attention to January 17, 1973. Did something happen on that date?

A Yes.

Q Did you have a particular conversation with the defendant?

A Yes, I did.

Q How did he identify himself on that date?

A That day he identified himself through an Ohio driver's license of James Mitchell.

Q Did you inquire as to the defendant's employment?

A Yes, I did.

Q Where did he say he was employed?

A He worked for Sony & Company.

Q Did he give you an address, sir?

THE COURT: Worked for where?

THE WITNESS: Sony.

A Yes, he did, Fifth Avenue.

Q In 145 Fourth Avenue, can you tell us where the mailboxes are located?

A There is chute near the elevator.

Q Where was your particular mailbox located?

A On the 17th floor, near the elevator. Oh, I am sorry, on the lobby floor to the right of the entrance.

Q Were there other mailboxes located in the vicinity of your mailbox?

A Yes, there was.

Q Particularly, was the mailbox for apartment 17-G located near yours?

A Yes, it was.

Q Did you ever have occasion during 1972 to examine the name listed as the occupant of 17-G?

A Yes, I did.

Q What name was listed?

A C. Dunbar.

Q In the lobby of 145 Fourth Avenue, was there a list of occupants and tenants?

A Yes, there was.

Q Did you ever have occasion during 1972 to examine that list and determine the name of the tenant listed for Apartment 17-G?

A I did.

Q What name was listed, sir?

A Charles Dunbar.

Q Sir, I direct your attention to November of 1972. Did you have a particular conversation with the defendant during that month?

A Yes, I did.

Q Can you tell us, sir, as briefly as possible the circumstances surrounding that conversation?

A It was approximately 11.30 at night. I heard a disturbance in the hallway. I was about to go out in the hallway, and I looked out, and I could see Mr. Dunbar and an oriental woman in a dispute.

The oriental woman was bleeding from the mouth. Her pocketbook was strewn about the floor.

I went out and asked the young lady if she was all right. She said no.

Q Without telling us what if anything the young lady said, just tell us the circumstances surrounding the incident, sir.

MR. SHERR: I will have to object to this.

I don't see where this is relevant at all.

THE COURT: I will take it subject to connection.

Mr. Dunbar was present?

THE WITNESS: Yes, he was.

THE COURT: I will take it subject to connection.

THE WITNESS: Could you repeat the question, please?

Q Don't tell us what if anything the young lady said. Just continue describing the circumstances, please.

A There was a dispute. I went out, and I asked if everybody was all right. I asked if anybody wanted to come into my apartment, settle the dispute, and both agreed to do so.

Q When you say both, you mean the young lady?

A And Mr. Dunbar.

Q While in your apartment, did you have a conversation with Mr. Dunbar?

A I did.

Q Sir, how were you dressed at that time?

A I was in a t-shirt and a pair of dungarees.

Q What was your purpose in going to the hallway, sir?

A I was going to put out the garbage.

Q While in your apartment, did you have a conversation with Mr. Dunbar?

A I did.

Q What did you say to him, and what did he say to you?

A I spoke to Mr. Dunbar about the music that he was keeping me awake with.

Q Had you ever had occasion in the past to speak to Mr. Dunbar about music?

A Many times.

Q Tell us what the conversation was.

MR. SHERR: I am going to note my objection, whether or not he spoke to anybody about music.

THE COURT: I will allow it.

MR. SHERR: Respectfully except.

THE COURT: I will allow it. It's either relevant or irrelevant. If it's irrelevant, I will disregard it.

Q Continue, please.

A It was at that time Mr. Dunbar stated to me that he was a pimp, and he knew I was a policeman, and that I would have to change my hours to coincide with his.

Q Were those his exact words, sir?

A Yes, they were.

MR. PADGETT: At this time I offer as 3502 and 3503 two prior statements of the witness.

(Government's Exhibits 3502 and 3503 were marked for identification.)

xx MR. PADGETT: At this time I am just offering 3502, and I tender 3503 as well.

THE COURT: Mr. Sherr, I take it you have not seen these before?

MR. SHERR: No, sir.

THE COURT: I think you should have adequate time to study them, and since I was going to recess for lunch in five minutes anyway, at this time we will recess for lunch. We will resume at ten minutes of two.

(Luncheon recess.)

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AFTERNOON SESSION

(1.50 p.m.)

S T E P H E N P. D R I S C O L L, having been previously sworn, resumed and testified further as follows:

MR. PADGETT: Your Honor, if I may be brief, I just would like to note for the record that the gentleman seated to my right is Agent Clark of the Internal Revenue Service, and I would like to note to the Court that it is my intention to call Mr. Clark as a witness on the trial. He is the case agent, and I just presumed that the policy of the Court on this trial would be the same as in previous cases, where the case agent was allowed to assist at the actual trial.

THE COURT: Yes, I will permit him to remain.

Mr. Sherr, are you ready to cross-examine?

MR. SHERR: Yes. Before cross-examination, I would like to move to strike the testimony of Officer Driscoll in that the entire testimony concerned a period from August '72 to January of 1973. Since this indictment alleges certain violations during the calendar year 1971, I respectfully submit that what occurred between August '72 and January '73 is not relevant and not properly before the Court.

THE COURT: I will deny the motion, certainly at this time. If something comes up that makes it renewable, you may renew it.

MR. SHERR: The problem I have with your Honor leaving that open is that if I cross-examine him on these issues now, I may be in a position of waiving my rights with respect to that motion.

THE COURT: By leaving it open, I left it open merely on the theory that there will be no connection shown between the state of facts during the time period that he testified and any earlier time. If there is some connection shown, then obviously it will stay in.

MR. SHERR: Thank you.

CROSS EXAMINATION

BY MR. SHERR:

Q Officer Driscoll, did Mr. Mitchell ever tell you who Charles Dunbar was?

A No, he did not.

Q Did he ever indicate to you that the Charles Dunbar was an individual who was presently confined to a Federal institution in Connecticut?

MR. PADGETT: Objection, move that it be stricken.

THE COURT: I will allow it.

A No, he did not.

Q Did you make any inquiries to ascertain whether or not there was an individual named Charles Dunbar?

A No, I did not.

Q The only knowledge you have of Charles Dunbar is by virtue of what you saw on the letterbox, and by virtue of what you say were your frequent conversations with Mr. Mitchell?

A Yes.

Q You testified, if I remember correctly, in response to the United States Attorney's questions, that you frequently asked him what his name was and he said his name was Dunbar. Is that correct?

A If I can -- I didn't ask him his name. I addressed him as Charles Dunbar. I didn't, every time I met him, didn't say, "Is your name Charles Dunbar?"

Q How many times did you meet him?

A In the course of the six months, approximately, probably about 15 times.

Q The first time you met him, did you address him as Mr. Dunbar?

A I did.

Q Had you checked the mailbox before you met him?

A Yes, I did.

Q You checked the mailbox of all the tenants when

you moved in?

A I wanted to know who I was speaking to.

Q Did you check the mailbox names of all the tenants when you moved in?

A No.

Q How many tenants are there in the building?

A Approximately 80.

Q Did you check any other mailboxes other than Mr. Mitchell's?

A Yes.

Q Whose?

A Some young ladies that I wanted to meet.

Q Where were they located?

A On different floors.

Q So you checked them, the names on the mailboxes of young ladies that you wanted to meet and Mr. Mitchell?

A Yes.

Q How did he fall into that category?

A I wanted to know who I was going to speak to because of the noise he was making.

Q What kind of noise was he making?

A Stereos late at night.

Q Was there a musical group? Were they playing instruments in that apartment?

A At one time, yes.

Q The fact that you complained about the noise, about this musical group, that they were playing instruments?

A At one time, yes.

Q And there was more than one person in the apartment when they had that musical group; is that correct?

A I believe so.

Q There were others, I mean, besides Mr. Mitchell; is that right?

A I believe so,yes.

Q And you had no way of knowing who the supposed tenant of that apartment was when you heard this noise, right, other than what you had seen on the mailbox?

A No, previous to that I spoke to Mr. Dunbar about his record playing.

Q How did you speak to him? Did you ring his doorbell?

A Yes, I did.

Q Was that the occasion when you were accompanied by three uniformed officers?

A No.

Q Was there an occasion when you went to his apartment with three uniformed officers?

A Yes.

Q Did you attempt to gain entrance?

A We attempted to speak to Mr. Dunbar.

Q What was the purpose of your visit?

A To tell him to turn down his music.

Q You called three uniformed officers to tell him to turn down his music?

A He wouldn't speak to me. He wouldn't respond to me.

Q So you hadn't spoken to him before that time?

A Many times before that.

Q How many times?

A Five, seven times.

Q In the hallways?

A In the hallways, at his door, yes.

Q You had gone to his apartment and opened his door?

A No, I wouldn't open his door.

Q You mean you spoke to him through the door?

A Through the door sometimes. Sometimes he'd open it.

Q And you said, "Mr. Dunbar, would you cut the music", and a male voice answered and said yes or no or something or other?

A At times, yes, at times.

Q So of these times that you spoke to him, how many times were these that you spoke to him through the door?

A Twice, three times.

Q At that time you didn't really know who you were talking to; is that correct? You didn't see him?

A I knew it was Mr. Dunbar.

Q Did you see anyone that you were talking to?

A At those two or three times, no.

Q There were times when there were other men in the apartment; is that correct?

A One other time that I remember.

Q That you know of, and there was certainly times when they had this musical group there?

A That's the time.

Q Were you aware that Mr. Mitchell writes music?

A No, I was not.

Q Did he ever tell you that?

A No.

Q The other times that you say that you addressed him is when you passed in the hall?

A And when he opened his door.

Q And on those occasions you addressed him as Mr.

Dunbar, and he answered you?

A Yes.

Q What did he say to you?

A I asked Him to turn down the music. He would either tell me yes, no, or go fuck myself.

Q Did you ever ask him if he is Mr. Dunbar?

A I addressed him as Dunbar.

Q But you never asked him, "Are you Mr. Dunbar"?

A No.

Q You addressed him as Mr. Dunbar and he answered you?

A Yes.

Q Is that correct?

You told us that in November of 1972, there was an altercation in the hallway?

A That's correct.

Q And this involved an oriental girl?

A Yes.

Q And the defendant?

A That's correct.

Q And you said you were dressed in dungarees; is that correct?

A I was dressed in dungarees, yes.

Q Were you also wearing your pistol?

A At the first time I spoke to him when I came out in the hallway, noi

Q Did you later go in and get your pistol?

A No. In fact, as I recall now, no, I had my shield on.

Q What do you mean, the first time that you spoke to him you didn't have your pistol?

A See, I was putting out the garbage at the time, and when I saw the altercation I went back and put down the garbage and went and got my shield.

Q And you didn't take your pistol?

A No, at that time I don't recall taking my pistol.

Q You don't recall? Is it that you know that you didn't or you don't recall?

A I don't recall.

Q Then you asked both of them to come into your apartment?

A There was at that time three present.

Q Was the third one a male?

A Yes.

Q Do you knnow the name of the other male?

A No, I do not.

Q Did the male come out of the same apartment?

A Of Mr. Dunbar? Yes.

Q That is 4-G? Is that the apartment?

A 17-G.

Q 17-G.

Do you know whether or not the other male was living in that apartment?

A I never saw him before.

Q You don't know whether or not he was living in that apartment?

A I do not know.

Q Then at your request they accompanied you into your apartment?

A Yes.

Q You didn't order them into your apartment?

A I did not.

Q In other words, you asked them would they voluntarily come into your apartment, and they said they voluntarily would?

A Yes.

Q Then when they came into your apartment, Mr. Mitchell says, "I am a pimp"?

A Yes.

Q Did you question him, or did he just volunteer this information?

A Well, I asked -- in fact, I talked to him about his music. That was my No. 1 concern since he'd been bothering me with the music for months, and he volunteered the statement to the effect that he was a pimp, and he knew I was a policeman now, and that I would have to change my hours to suit him.

Q Let me get this straight. You tried to enter his apartment with three policemen previously, and he had refused to let you enter. Then on the next occasion you asked him to come into your apartment, and he came in voluntarily?

MR. PADGETT: Are you finished?

MR. SHERR: No.

MR. PADGETT: All right.

Q He came in voluntarily along with this lady and this other man, and you complained to him about the music, and he told you, "I am a pimp, you have to change your hours"?

MR. PADGETT: Objection, your Honor.

THE COURT: I will allow it.

Can you answer that question in that form, Officer?

A I cannot. I can answer it, yes.

THE COURT: You can answer it in that form?

THE WITNESS: No, the time lapse is wrong. The policemen came after this incident. Previous to all this, I was going to the door by myself.

Q I see. So the first incident was November of 1973 when you observed the altercation in the hallway with the oriental girl?

A Yes.

Q And there were no other incidents prior to November of 1973?

A Incidents in what respect?

Q Of any respect.

A Noise?

Q Other than noise.

A Other than noise, no.

Q When you took him into the other apartment, did the other man say anything?

A No, I can't recall that he did.

Q Did you ask the other man to identify himself?

A I did not.

Q You were only concerned with the defendant?

A With my own quiet and peace at home.

Q When you said you indicated to them that you were a police officer, did you show them the shield?

A In the hallway I did.

Q Did you, at the time when you asked them to come into your apartment, indicate for what purpose you were taking them into your apartment?

MR. PADGETT: Objection to form.

THE COURT: I will allow it.

A Yes, I wanted to talk to them about the noise, and about this incident that was just previously happening.

Q Couldn't you have talked to them in the hallway?

A I thought it was more comfortable inside. It was a narrow hallway. There was now four of us in the hallway. I asked him, "You want to come inside?" and they said yes.

Q You didn't want to take them back into their own apartment?

MR. PADGETT: Objection to form.

Q Did you suggest to them that they go back into their own apartment?

A No, I did not.

Q So you displayed your badge, and you took them into your apartment; is that correct?

MR. PADGETT: Your Honor, I must object. There is no testimony the witness took anybody anywhere.

THE COURT: I think the record is clear as to what happened, so I will allow the question.

MR. PADGETT: Very good.

Q Did you display your badge in the hallway?

A I did.

Q Did you give this defendant or the young lady or the other man any admonitions or warnings with respect to anything they might say?

A No, not at all.

Q You told them you are a police officer, you took them to your apartment, but you made no statements to them that they were not required to say anything?

A They were not under any investigation.

THE COURT: Now we are getting into that kind of a question, I will sustain the objection to the word "took", because the record doesn't support that.

MR. SHERR: All right.

Q You suggested that they follow you into your apartment; is that fair?

A I asked the young lady if she wanted to go into my apartment. She said yes. I turned to Mr. Mitchell and his friend and I said, "Would you like to come with us too", and they said yes.

Q That was after you displayed your badge?

A Yes.

Q When you first saw them, you had gone out for

the garbage and you did not have your badge?

A I did not.

Q Then you went back into your apartment, got your badge and possibly your pistol, you don't recall?

A I don't recall.

MR. PADGETT: Objection.

THE COURT: I will allow it.

Q And then came out and suggested that they accompany you to your apartment?

A That's correct.

Q When they got to your apartment, did you give them any warnings or any admonishments with respect to their rights in any way?

A They weren't under any investigation.

Q I just asked you if you --

THE COURT: The answer is you did not?

THE WITNESS: I did not.

Q They weren't under any investigation at all?

A No.

Q At that time, did you suggest to the defendant or any of the other two parties that they had committed any crime?

A No, I did not.

Q Was it your opinion at that time that the

defendant was a pimp?

Q Had you harbored that opinion prior to your meeting them in the hallway?

A I did.

Q When you brought them into your apartment, were there any questions addressed to them to determine whether or not the girl involved was a prostitute?

A No.

Q What exactly did you say to these people when you brought them into your apartment?

A I object to the form again.

Q Or when you suggested that they accompany you to your apartment? That wasn't intentional.

A My whole purpose was just to talk to them about the noise.

Q What exactly did you say?

A I said, "Dunbar, I want to talk to you about this noise."

And he said, "Well, I am a pimp and you are a policeman."

He said, "You are going to have to change your hours to coincide with mine."

Q That was all you said was, "I am going to have to talk to you about this noise"?

A Yes.

Q You didn't say anything about the altercation?

A We never got to that at that point.

Q Didn't you say you saw this woman bleeding?

A Yes, I did.

Q So you suggested they come into the apartment. You saw a woman bleeding, you believed an altercation had taken place which would be an assault, and all you said in your apartment was, "I am going to have to talk to you about this noise"?

A At that point, yes.

Q You never said anything about a possible assault?

A Not to them.

Q You never asked the woman who hit her?

A Not at that time.

MR. PADGETT: Objection.

THE COURT: He says not at that time.

Q When did you? Did you eventually ask the woman who hit her?

A I didn't even ask. Since there were only two in the hallway, I --

Q You said there were three, I thought.

A Not in the original confrontation. There as only two.

Q When you came out the second time, there was a third man?

A No, there were still two at that time.

Q When did the third man show up?

A When Charles Dunbar yelled to someone in his apartment to come out.

Q You know that the defendant and the woman had come out of that apartment, 17-G, or whatever it is; is that correct?

A Yes.

Q When did he yell for that someone to come out of his apartment?

A The second time, when I came out of my apartment, and we were talking in the hallway.

Q Would that be when you showed your shield?

A It was when I came out, the third person that I thought to kind of calm this whole atmosphere down.

Q You mean when the defendant called to the man in the apartment, was that after you showed your shield?

A No, that was before.

Q Before you showed your shield, did you ask the lady who hit her?

A I did not.

THE COURT: Officer, where had you had the shield

before the man came out of the apartment? Was it in your pocket?

THE WITNESS: Yes, it was in my pocket.

THE COURT: In other words, it wasn't displayed on your person?

THE WITNESS: No, it was in my pocket.

Q Isn't assault a crime?

A It is.

Q Weren't you at all interested in finding out who hit her?

A I asked her if she would want to come into my apartment, and she said yes.

Q But you just said you never asked her who hit her.

A No, it was obvious to me who hit her.

Q It was obvious to you?

A Yes.

Q Did you ask the defendant if he hit her?

A At that time, no.

Q Did you ask the second man if he had hit her?

A No.

Q Did you advise her that if an assault had been committed on her, that she could file a complaint and have the person arrested?

A Later on in the evening, yes.

Q When later on in the evening?

A It was at that time when I had all three of them in my apartment that I said, "Do you want to file a complaint against this man?"

Q How long did they stay in your apartment?

A Mr. Dunbar and the friend approximately five minutes. Then the young lady, maybe eight, nine minutes.

Q During this five minutes, was there any other conversation other than what you have told us?

A Mr. Dunbar told the young lady that she could get her clothes out of his house.

Q Anything else?

A I asked her if she wanted to call a taxi. She said yes.

Q Anything else?

A Mr. Dunbar came back into my apartment.

Q Let's take the first five minutes when everybody was there.

Was anything else said?

A I can't recall.

Q See if I have this correctly:

During the five minutes they were in your apartment, you turned to the man you knew as Mr. Dunbar, and you

complained to him about the noise?

A Yes.

Q And he said, "I am a pimp, and you will have to change your hours," and then you said something -- he said something to the young lady about getting her clothes out, and you asked her if she wanted to call a cab?

A And does she want to file a complaint against him.

Q That was all during the five minutes?

A Yes.

Q That was all that was said during the five minutes?

A The other conversation, I don't recall what the other conversation was.

Q You are sure that this happened when you say it happened?

A Yes, in the month of November.

Q Did Mr. Mitchell ever tell you he was a pimp other than on that occasion?

A No.

Q You signed an affidavit for the United States Attorney. Are you aware of that?

A Yes, I am.

Q Are you aware that in your affidavit you said

that Mr. Mitchell told you he was a pimp in January of '73?

A January of '73 was when Mr. Mitchell was arrested.

Q Are you aware that you told the United States Attorney that Mr. Mitchell told you he was a pimp in January of '73?

A Yes.

Q Not November of '72 as you testified?

A It was November of '72.

7 Q I show you this affidavit and ask you if there is anything in there that shows that he told you he was a pimp and that you had to change your hours in November of '72?

A No.

Q You read this affidavit before you signed it?

A I did.

Q You are aware that the affidavit contains the printed clause, "I have read the foregoing statement consisting of this page only, and I fully understand the statement, and it is true and accurate and complete to the best of my knowledge"?

A Yes.

Q Is there something else you left out from this affidavit?

MR. PADGETT: Objection.

THE COURT: Yes, I will sustain that.

Q Did you arrest Mr. Mitchell?

A I did.

Q When?

A January 17, 1973.

Q For what?

A Harassment.

Q Harassment of whom?

A Me, myself.

Q What happened when you arrested him?

A He was in the company of another person.

Q What happened after you arrested him?

MR. PADGETT: Objection.

MR. SHERR: That is not my question.

MR. PADGETT: That is precisely why I am objecting.

MR. SHERR: I will withdraw the question.

Q When you arrested him, did you take him to court?

A I did.

Q What happened in court?

A He received an ACD conditional discharge.

Q Was this the first time he was there?

A At the arraignment, yes.

Q This case was dismissed at the arraignment; is that correct?

MR. PADGETT: Objection.

THE COURT: Yes, I will sustain that.

The word "dismissed" has a legal connotation here.

Q Is there any ill feeling between you and Mr. Mitchell?

A Absolutely none.

Q You never felt badly or poorly towards him because of all this noise that he was causing?

A He caused me a great deal of loss of sleep, but I never felt bad about it.

Q You never held that against him, right?

A No.

Q You made numerous complaints to him about the noise that he caused, the fact that he was causing you loss of sleep, but you had no ill feeling whatsoever towards him?

A I was concerned that I was losing sleep, but I wish him to harm.

Q Did you ever make any efforts to ascertain the identity of the other man who was in the apartment on the occasion you testified to?

A No, I did not.

Q When you arrested Mr. Mitchell, did you also arrest another man?

A I did.

Q Who was also in that apartment?

A Yes, he was.

Q Do you know whether or not he was living there?

A I know he wasn't.

Q How do you know?

A He identified himself as living in Philadelphia.

Q That is what he told you?

A And that's what it subsequently proved.

Q Do you know what his name was?

A Yes, I do.

Q This was not the same man as the man who came out of the apartment on that occasion in November of '72?

A No, it wasn't.

Q Do you know whether or not the man in November of 1972 whose identity we have not established was living in that apartment?

A I cannot say. I know he was not, but I never saw him before.

Q Is it that you don't know whether he was?

A I do not know whether he was.

Q There are many tenants in that building that you

never saw before or since; is that not correct?

A Of course.

Q Do you know who lives on the other side of your apartment?

A Yes.

Q How many apartments are there on the floor?

A Approximately seven, eight.

Q How many live in the apartment next to you on your left?

A Two.

Q How about the apartment next to that?

A One.

Q And the apartment next to that?

A One.

Q Do you know the names of those people?

A I know the people directly to the left of me. I do not know the other two people. Yes, I do, I take it back. I know two people over. I am sorry, I know immediately to my left and two apartments over.

Q You know the names of some of the people on your floor, and you don't know the names of some of the others?

A Yes.

Q Would it be fair to say that you know the names of the people who live in some of the apartments on your

floor, and you don't know the number of people who live in some of the other apartments?

A Yes.

MR. SHERR: I have no further questions.

THE COURT: Any redirect?

MR. PADGETT: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. PADGETT:

Q Officer Driscoll, this man that you arrested in January 1973, what did you charge him with?

A Harassment and possession of dangerous drugs.

Q Very briefly, what were the facts behind that arrest?

MR. SHERR: I will have to object, if your Honor please.

THE COURT: I will allow it. You opened the door on this.

A In the morning, about 5 o'clock in the morning on January 17, 1973, I at that time had the police up to talk to Mr. Dunbar about the music.

Q Excuse me. Was that the incident referred to by counsel in his cross-examination?

A Yes, it was.

Q Thank you. Go ahead.

A They banged on the door. Mr. Mitchell wouldn't open the door. They said there was nothing more they could do, and they left.

At that time the music went back on again, but remained on for only about 10 minutes and then turned off.

I was wide awake at that time, and I decided I'd speak to him once more about the music. I went out and I met the defendant and another, Theodore Pendergrass, in the hallway. I at that time said, "Dunbar, I want to speak to you about your music," and with that Theodore Pendergrass said, "Man, I am going to put a razor to you," and both Dubar and Penfergrass came towards me.

It was at that time I drew my revolver and told them that they were under arrest.

Q And what happened to the Pendergrass case?

A It's still pending.

MR. PADGETT: Thank you very much.

THE COURT: You may step down, sir.

(Witness excused.)

MR. PADGETT: The Government calls Joseph Moyal to the stand.

MR. SHERR: May I just see Government's Exhibit 3, please?

THE COURT: Certainly.

J O S E P H D. M O Y A L , called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PADGETT:

Q Mr. Moyal, what is your occupation?

A I am manager of Rollston Motors.

Q What is the business of Rollston Motors?

A They sell and service Rolls-Royce.

Q In 1971 were you so employed?

A Yes, sir.

Q I direct your attention to July 12, 1971. Did something happen on that day?

A Yes, Mitchell came over.

Q When you say Mitchell, sir, you pointed to a gentleman at this table?

A Yes.

Q Can you tell us to whom you are pointing?

A To the guy with the -- what is that, pink shirt on, pink jacket.

MR. PADGETT: May the record reflect the witness has identified the defendant?

THE COURT: It may.

Q Continue, please.

A He came over, and he purchased a car from me.

Q What type of car did he purchase?

A Rolls-Royce.

Q What was the cost of that car?

A It was a trade-in on another car that he had owned by the name of Donna Mitchell.

Q What type of car was traded in?

A It's a Rolls-Royce too.

Q What year was the trade-in car?

A It's a '61.

Q What was the year of the purchased automobile?

A It's a '61 too.

Q Was there any difference in value between the vehicle that was traded In and th Evehicle that he received?

A Yes, it was $1000 difference.

Q Which cost more?

A The one that I sold him.

Q What was the value of the car that was traded in? What was the trade in value you gave him?

A $4500.

Q That would make the new car $5500, correct?

A 55, yes.

Q When the defendant traded in the 1961 Rolls-

Royce, did he give you any documentation for that car?

A It was a document by Donna Mitchell. That was a lady with him.

MR. SHERR: I am sorry, I didn't hear the last answer.

THE WITNESS: It was a lady with him, when they came to purchase the car, and she signed the paper as the name by Donna Mitchell.

Q Donna Mitchell.

Do you remember in which name the vehicle had been registered?

A By Donna Mitchell.

Q Can you describe that woman?

A She was a woman, elderly woman in her, I think, early '40s or late -- late '40s, something like that, and she was a colored woman with short hair. She is medium build --

MR. SHERR: Your Honor, I object to this testimony, this testimony about the purchase of an automobile by one Donna Mitchell and the trade in of an automobile owned by one Donna Mitchell. There is no basis for connecting it with the defendant.

THE COURT: Let's hear it out. He was there.

MR. SHERR: He was there.

THE COURT: Let's hear it out, and if there is no connection, you can move to strike it.

MR. PADGETT: It's testimony about the purchase of a vehicle by the defendant using the name Donna Mitchell.

MR. SHERR: I object to that. That is his conclusion.

THE COURT: I agree that is a statement by counsel which is not evidence. Let's see what the evidence is.

Q Sir, did you prepare a bill of sale reflecting the purchase of this vehicle?

A Yes.

Q What did you do with that bill of sale?

A We gave him a bill of sale on the name, you know, the lady was there, because she has to sign on that thing.

Q To whom did you give the bill of sale?

A To Donna Mitchell.

Q I show you this Xerox copy. Do you recognize it, sir?

A Yes, I do.

Q What do you recognize it to be, sir?

A That's the bill of sale that was made to her.

MR. PADGETT: May this be received as Government's Exhibit 4 for identification, please.

(Government's Exhibit 4 was marked for identification.)

xx Q Sir, do you know where the original of this bill of sale is?

A I don't have it. It must -- with the lady, she must have it.

Q But you were present when the original was made, were you not?

A That's right.

Q Is this an accurate copy of that?

A That's right.

Q In addition to preparing the bill of sale, did you prepare any other documents at the time of the sale?

A Usually in the State of New York you make an MV-50 on that.

Q What is an MV-50, sir?

A That is a purchase from a dealer to a purchaser.

Q How many such MV-50's have you prepared?

A Well, we made one to --

Q No, sir, throughout your entire business career, how many such MV-50's have you prepared?

A Oh, prepared a few hundred of them.

Q Do you know what the letters MV stand for?

A It's the Motor Vehicle.

Q Can you tell us what the purpose of this form is, sir?

A It's to certify that the motor vehicle that was purchased was purchased legally and was sold legally.

Q And it is prepared by the dealer; is that correct?

A By the dealer.

Q You prepared one in this case, sir?

A Yes, I did.

Q Do you know when you prepared it, sir?

A Well, I don't remember the exact date, but I prepared that when Donna Mitchell bought the car from me.

Q You prepared one contemporaneous with the sale; is that correct?

A That's right, when she purchased the car.

Q Did there come a time when you prepared a second MV-50?

A Well, the first one prepared was on the name of -- it was the address was Ohio, I think Cleveland, some place; and then they took -- then they brought -- it was brought back, the purchaser, the original MV-50 and they required it to be made for New York State.

And that's when I made another one. I took the original one that was made to Ohio, and I gave him another

one that was made to New York.

Q Sir, I show you this Xerox copy. Do you recognize it?

A Yes, sir.

Q You will have to speak up, sir.

Do you recognize it?

A Yes, I do.

Q What do you recognize it to be, sir?

A That's the MV-50.

Q Which MV-50, the first or the second?

A That's the first one that we made for Ohio.

MR. PADGETT: May this be received as Government's Exhibit 5 for identification.

(Government 's Exhibit 5 was marked for identification.)

xx Q This, sir, is a Xerox copy. Do you have the original?

A Yes, I do. The original should be in New York State, but I have th copy of the original.

Q You have a copy which was made at the time?

A That's right.

Q May I see it, sir?

(The witness handed a paper to Mr. Padgett.)

Q This appears to be a carbon copy; is that

correct?

A That's right.

Q Were you present when this was made out?

A Yes.

MR. PADGETT: May this be received as Government's Exhibit 6 for identification.

(Government's Exhibit 6 was marked for identification.)

xx Q Would you compare 5 and 6, sir, and tell me if they are exactly the same?

A Yes, they are.

Q Now, sir, I show you this Xerox copy.

Do you recognize it?

A Yes.

Q Can you tell us what that is, sir?

A That's the second one that was made for New York State.

Q Do you have a carbon copy of that, sir?

(The witness handed a paper to Mr. Padgett.)

MR. PADGETT: May the Xerox be received as 7 and the carbon as 8 for identification.

(Government's Exhibits 7 and 8 were marked for identification.)

xx THE COURT: Mr. Padgett, why do you need the

Xerox?

MR. PADGETT: I have been giving to counsel Xerox copies. I have not in fact Xeroxed the carbons. This is the first time I have seen this, in fact. It's purely for the defense's assistance.

Q Now, sir, during the period of time between July 12, when you sold the Rolls-Royce to either the defendant or to Donna Mitchell --

MR. SHERR: No, I object to either the defendant or Donna Mitchell. There is no testimony he sold it to the defendant.

MR. PADGETT: I will withdraw the question and rephrase it.

THE COURT: Yes, I will sustain it.

Q On the 12th of July when you sold the Rolls-Royce, between that time and the time you prepared the second MV-50, did you ever have occasion to service that Rolls-Royce?

A Yes, we did some minor work on it.

THE COURT: Mr. Moyal, what was the date of that second MV-50? I don't think that has been established by the exhibit.

MR. SHERR: May 2, 1972.

Q Between July of '71 and May of '72, did you say

you had occasion to service the Rolls-Royce?

A That's right.

Q During that period of time, did you have occasion to speak to Mr. Mitchell about the Rolls-Royce?

A Yes, I did.

Q Can you tell us the circumstances of your speaking with Mr. Mitchell?

MR. SHERR: I object to servicing of an automobile.

THE COURT: Let's see what the conversation is, which is what is the relevant thing.

Go ahead, overruled.

MR. SHERR: Respectfully except.

A It's with repairing the car, certain thing that was supposed to be done to it, and after he got the car and brought it back for --

Q Do you remember how Mr. Mitchell referred to the car?

A Well, as his car.

Q I am sorry?

A As his car.

Q As his car.

Now, sir, when the second MV-50 was prepared in May of '72, did you have a particular conversation with

Mr. Mitchell?

A Yes, I mentioned to him that there would be sales tax on that thing, and he paid it.

Q What did he say?

A He paid the sales tax.

Q Do you remember how he paid it?

A He paid it in cash.

Q The $1000 difference between the trade-in value of the first Rolls-Royce and the cost of the second Rolls-Royce, how was that paid?

A It was also paid in cash.

Q Who handed you the cash?

A I think Mitchell handed me the cash.

Q At the time the first Rolls-Royce was traded in, did you examine any paper work belonging to that Rolls-Royce?

A The first one, yes, I do have here the original copy of the first Rolls-Royce.

Q You are now showing us a yellow piece of paper. Can you tell us what that is, sir?

A That's a title of certificate from -- from Cleveland, from Ohio.

Q Does that pertain to the original Rolls-Royce?

A That is pertaining to the original Rolls-Royce.

Q May I see it, sir?

(The witness handed a paper to Mr. Padgett.)

MR. PADGETT: May this be received as Government's Exhibit 9 for identification, please.

(Government's Exhibit 9 was marked for identification.)

Q On this certificate of title, is there a space for the value of a car?

A Yes, there is, in the bottom.

Q Without telling us what that is, if anything, entered in that space, sir, what value did you place upon the 1961 Rolls-Royce that was traded in?

MR. SHERR: I have to object to this, if your Honor please.

THE COURT: Yes, I will sustain that objection. I don't see how that becomes admissible, even subject to connection, unless there is something coming up that I don't foresee.

Q You gave $4500 credit on that '61 Rolls that was traded, did you not?

A Yes, that's right.

MR. PADGETT: At this time, your Honor, I would offer Government's Exhibits 4 through 9 previously received for identification as evidence.

THE COURT: Mr. Sherr?

MR. SHERR: I object, if it please your Honor. There has been no evidence establishing that either the vehicle that was traded in was owned by the defendant or that the vehicle that was purchased was owned by the defendant.

The only thing that was established was that he was with the lady who purchased the automobile. She signed all the documentation. She signed the bill of sale. The bills of sale were issued to her.

The mere fact that he was with her or may have used the automobile certainly is not any evidence of income or of assets.

MR. PADGETT: May I be heard, your Honor? I think there is a significant point, and that is the--

THE COURT: He said it was his car when he came in to have it serviced. On the basis of that, I will allow it subject to a subsequent motion to strike which will be appropriate.

MR. SHERR: Respectfully except.

THE COURT: Let me see the exhibits.

Is this one included in that offer?

MR. PADGETT: Yes, sir, that is Exhibit 9.

THE COURT: Mr. Moyal, let me put these in front

of you, Exhibits 4, 5, 6, 7, and 8.

You prepared 4, 5, 6, 7, and 8, did you not?

THE WITNESS: Yes.

MR. SHERR: Was that 4 through 9, your Honor?

THE COURT: 4, 5, 6, 7, and 8, those I am admitting.

Mr. Padgett, why is 9 admissible?

MR. PADGETT: Well, your Honor, 9 was a tender of the initial certificate of title, referring to the 1961 Rolls-Royce which was traded in. It would be the Government's position that this vehicle was indeed Mr. Mitchell's and was part of the value received by Mr. Moyal in exchange for the '61 vehicle which was referred to by Mr. Mitchell as his.

It becomes significant in this case, your Honor, when attention is drawn to the value of the vehicle as stated, $200, and also to the amount of tax which is noted next to that. I think is's $9 or some rather small sum.

It would be the Government's position that this gross underestimation of the vehicle's value is indication of the defendant's intent to evade taxes not only in the State of New York and Federal taxes, but also local taxes in the State of Ohio, and also the sum of sales tax due and owing in Ohio and in fact paid by the defendant or paid

by the owner of the vehicle would indicate his familiarity with tax laws as such.

MR. SHERR: If your Honor please, defendant is not under indictment or charged with violating the tax laws of the State of Ohio or the State of New York. As such, the purpose for which counsel is offering these in evidence as stated is completely and totally irrelevant.

THE COURT: Let me ask you this, Mr. Padgett:

Do you intend to offer any further proof to the origin of this first car, in other words, where it came from, who owned it, who paid anything on it, anything of that kind?

MR. PADGETT: No, sir, the Government would ask the Court to conclude from the circumstances of its tender to Mr. Moyal that it indeed was the defendant Mitchell's car.

THE COURT: I think I am going to exclude Exhibit 9 for identification.

MR. PADGETT: Very well.

THE COURT: I will sustain the objection to 9.

I will admit 4 through 8.

(Government's Exhibits 4 through 8 for identification were received in evidence.)

MR. SHERR: With respect to my prior motion

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which your Honor gave me leave to renew, I would like to point out that in the exhibits offered, with respect to the vehicle No. 1 that was owned by Donna Mitchell.

MR. PADGETT: Objection.

MR. SHERR: That it was purchased from a party in Cleveland, Ohio, that Donna Mitchell --

THE COURT: I am excluding Exhibit 9 as to the ownership of the prior automobile.

MR. SHERR: You are excluding that?

THE COURT: I am excluding Exhibit 9 for identification.

MR. SHERR: All right.

THE COURT: Go ahead.

MR. PADGETT: Your Honor, at this time may the record reflect that I am making available to counsel copy of an affidavit submitted over Mr. Moyal's signature.

THE COURT: Mark it first as a 3500 exhibit, if you will.

MR. PADGETT: I am sorry, as 3504.

THE COURT: Mr. Sherr, have you seen these before?

MR. SHERR: No, sir, your Honor. I have requested them, but counsel refused to give them to me until after the witness testified.

THE COURT: That is what the statute provides, as you know.

MR. SHERR: I just am advising your Honor that I requested them.

THE COURT: All right.

MR. PADGETT: May the record then reflect that it's about 10-line affidavit.

MR. SHERR: Do you have the original of this? It's hard to read the Xerox.

MR. PADGETT: Yes.

(Mr. Padgett handed a paper to Mr. Sherr.)

CROSS EXAMINATION

XX

BY MR. SHERR:

Q Mr. Moyal, just a question or two.

At the time of this sale, do you recall going with Mrs. Mitchell to a Notary Public for the purpose of executing certain papers?

A Yes, I do.

Q At that time you went with her alone, James Mitchell did not accompany you?

A That's true.

Q When these papers were executed, wasn't it at that time that the $1000 was delivered to you?

A I don't recall, but I think it's something around

that date.

Q Wasn't it Mrs. Mitchell who gave you that $1000 at the Notary Public's office?

A No, she did not give me that.

Q Are you certain of that?

A Absolutely.

MR. SHERR: I have no further questions.

THE COURT: All right, you may step down, sir.

(Witness excused.)

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W E N D I B A R B A R A E P S T E I N , called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PADGETT:

Q Miss Epstein, you will have to speak up in a loud voice so we can hear you.

Miss Epstein, by whom are you employed?

A Central Savings Bank.

Q In what capacity?

A I am a senior clerk.

Q Can you tell us what your duties are?

A I take care of customers and subpoenas that come in, customer problems.

Q Are you familiar with the records keeping procedure of the Central Savings Bank?

A Yes, I am.

THE COURT: What is the address of your bank, Miss Epstein?

THE WITNESS: 145 Fourth Avenue.

THE COURT: Go ahead.

Q Miss Epstein, did you bring some documents with you today?

A Yes, I did. I brought this --

Q All right, yes, you did.

Where did you get these documents from?

A We have them in our files.

Q Did you withdraw them from the files?

A Yes, I did.

MR. PADGETT: There are two pieces of paper there. One is what appears to be an index card.

May this be received as Government's Exhibit 10 for identification?

(Government's Exhibit 10 was marked for identification.)

Q Miss Epstein, on this index card, can you tell us what that is, please?

A Yes, that's a signature card that somebody fills out when they open an account with our bank.

Q Are you familiar with that type of form?

A Yes, everybody fills one out.

Q How many similar forms have you seen?

A Oh, thousands of these.

Q Can you tell us, is it the regular course of business for the Central Savings Bank to prepare forms similar to that?

A Yes.

Q Is it the regular course of business for the

Central Savings Bank to make any notations on there on the dates indicated?

A Whenever we open one, we put the date. When we close one, we put the date.

Q I ask you to examine this, and do you recognize any of the handwriting or initials or any marks thereon at all?

A I recognize the initial of the person who opened the account.

Q Where is that?

A We initial them in the corner or on the back.

Q You are pointing to the lower right-hand corner?

A Right.

Q Can you tell us whose initial that is?

A Yes, that is the head of new accounts, Mr. Acevedo.

Q How many times have you seen that initial?

A Hundreds of times.

MR. PADGETT: At this time, your Honor, I would offer Government's 10 in evidence, previously received as Government's 10 for identification.

MR. SHERR: If your Honor please, I object to this on the ground that this, as I read it, is stated as having been opened October 17, 1972, closed February 7,

1973. I can't see how it can bear on income in 1971, which is the subject of the indictment.

THE COURT: Mr. Padgett, how about that?

MR. PADGETT: Yes, your Honor, I think it bears on the indictment in two ways:

One, it shows the defendant, if indeed this can be connected to the defendant, as a fairly sophisticated individual who was familiar with banking practices and so familiar that indeed he opened an account in a bank.

Second, therefore, it would have a bearing upon the wilfulness necessary -- which the Government must show to sustain its burden.

Thirdly, if in fact this can be connected to the defendant, it puts him in the geographical location of an apartment house wherein witnesses have testified he used a false name. That would also go to the intent necessary that the Government show, and it would also go to wilfulness, which we must establish.

THE COURT: Let me see that card.

Do you propose to have more proof concerning this account of any kind?

MR. PADGETT: Your Honor, I propose to attempt to introduce a transcript of the account which would show the transactions admittedly during the period not covered

by the indictment, but since one of the elements the Government must show is the defendant's intent and the wilful nature of the defendant's action, I think the Court can accept this as evidence of the defendant's ability to comprehend the requirements, his ability to be familiar with financial transactions.

MR. SHERR: If your Honor please, this is a year later. Even assuming that the defendant, any defendant, had a wilful intent to do something a year after a charged crime, that has no bearing on what happened in 1971. The fact that he opened an account 10 months after the end of the year for which he is indicted?

THE COURT: Mr. Sherr, I tend to agree with you, but I am going to leave it in at this point, and you may move to strike it at the close of the Government's case if you deem it appropriate. To me it has marginal relevance.

MR. PADGETT: Your Honor, may I point out that it's not quite 10 months. If the defendant is required to file in April of '72, and this account is opened in October of 1972, we now have a bare six months. That certainly becomes closer in time.

MR. SHERR: It reflects a transaction at the earliest in October of 1972, and the indictment alleges

failure to report income earned in '71. There is no connection here.

MR. PADGETT: And a failure to file in '72.

THE COURT: At this time I will receive it, and I have made known my views as to its relevance.

MR. SHERR: For the record, I respectfully except.

(Government's Exhibit 10 for identification was received in evidence.)

xx BY MR. PADGETT:

Q Miss Epstein, I show you this second document which you brought in. You identified it, have you not?

A Yes, I have.

THE COURT: This is a transcript of the account?

MR. PADGETT: Yes, your Honor.

May this be received?

THE COURT: Mr. Sherr, do you want to look at it?

MR. SHERR: I have the same objection:

It has no bearing or relevancy, and it's prejudicial.

THE COURT: Let me look at it.

(Government's Exhibit 11 was marked for identification.)

xx MR. SHERR: If there was anything wrong during

those periods, the Government could have indicted for '72 and '73. They had ample opportunity, certainly for the year '72, and they chose not to do so.

THE COURT: I will allow it subject to your right to strike it.

MR. SHERR: May I see it, please?

(Government's Exhibit 11 was received in evidence.)

xx THE COURT: Mr. Padgett, do you have anything more with this witness?

MR. PADGETT: I am sorry, I thought counsel was still considering that.

Q Miss Epstein, I show you this index card.

Do you recognize that?

A That's another signature card that somebody fills out when they open an account.

Q Is this prepared with the same requirements as Government's Exhibit 10, about which you have already told us?

A Yes.

Q Do you recognize any initials on that, please?

A I see the initial, but I wasn't with the bank in '69 and I don't recognize whose initial it is.

Q Did you remove that particular index card from

the files today?

A Yes, I did, today.

MR. PADGETT: Your Honor, may this be received as Government's 12 for identification?

THE COURT: Are you offering it in evidence?

MR. PADGETT: Yes, sir, I do.

THE COURT: Let's offer it in evidence.

MR. SHERR: May I see it?

(Document handed to Mr. Sherr.)

THE COURT: Miss Epstein, this card, Exhibit 12 for identification, came from the repository of all signature cards in your bank?

THE WITNESS: We have an archives we keep them in, yes.

THE COURT: You are familiar with the manner of keeping them?

THE WITNESS: Yes.

THE COURT: The making and keeping of signature cards?

THE WITNESS: Yes, I am.

THE COURT: This is such a card, right?

THE WITNESS: Yes, it is.

MR. SHERR: I object to this being offered in evidence, if your Honor please. First of all, on the

first ground, that it relates to the year 1969, which is not the subject of indictment.

Second ground that there is no proof of the identity of the signatures on the card. There is no proof that the defendant signed this card, and there is no proof, as I understand it from the witness, that she recognizes the signature of the person who initialed it.

There is no proof as to the execution of this card whatsoever.

THE COURT: Let me see it.

MR. PADGETT: Your Honor, to assist the Court, I might point out that this card is made out in the name of Charles Dunbar in 1969 with the same address, and I would ask the Court to inspect the information concerning wife and children on each of those cards. They appear to be the same.

MR. SHERR: If your Honor please, the mere fact that I don't object to counsel's conclusions, there is no jury here, so you understand I don't agree with his comments about what appears to be the same and so on.

THE COURT: No, I will allow it in evidence.

MR. SHERR: Respectfully except.

THE WITNESS: Someone will recognize that initial at the bank.

(Government's Exhibit 12 for identification was received in evidence.)

Q Miss Epstein, this fourth piece of paper that you have brought us, is that a transcript of the account referred to on Government's Exhibit 12?

A Yes, it is.

Q Was that also withdrawn from the files of the Central Savings Bank today?

A Yes, it was.

Q And all that you have told us about the transcript which is received as Government's Exhibit 11 holds true for this piece of paper as well?

A Yes, it is.

MR. PADGETT: I would offer this as Government's Exhibit 13.

THE COURT: In evidence?

MR. PADGETT: Yes, sir.

MR. SHERR: Same objection, that it relates to a period not involved in the indictment.

Secondly, there is no evidence connecting this account to the defendant.

THE COURT: Overruled. I will take it subject to a motion.

(Government's Exhibit 13 was received in

evidence.)

MR. PADGETT: I have no further questions of this witness.

MR. SHERR: I have no questions.

THE COURT: Thank you very much.

(Witness excused.)

MR. PADGETT: Government calls David Pravda to the stand.

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DAVID A. PRAVDA, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PADGETT:

Q Mr. Pravda, how are you employed?

A I am an attorney.

Q For how long have you been admitted to the bar?

A For nine years.

Q You are admitted in the State of New York; is that correct?

A I am.

Q In your capacity as an attorney, did you ever represent a man named James Mitchell?

A I did.

Q Do you see that gentleman here in court?

A I do.

MR. SHERR: If your Honor please, at this time the defendant wishes to assert his privilege of attorney-client relationship with respect to any transactions between this attorney and himself.

THE COURT: All right, let's wait till we get to a communication that is privileged, and then we will apply it.

Q Will you identify him, please?

A The gentleman at counsel table.

THE COURT: When did you represent Mr. Mitchell as counsel?

THE WITNESS: Starting in 1971, and then off and on to date.

Q Mr. Pravda, did there come a time when you represented Mr. Mitchell in a landlord-tenant matter?

A Yes.

Q Can you tell us the name of the plaintiff in that matter?

I cannot. I do not now remember.

Q Can you tell us the nature of the matter?

MR. SHERR: I object to this, if it please your Honor.

MR. PADGETT: I will withdraw it, your Honor. I think the landlord-tenant will describe it.

THE COURT: Do we have Mr. Pravda's office address on the record?

THE WITNESS: I don't think so.

THE COURT: Where is your office?

THE WITNESS: 10 East 40th Street in Manhattan.

Q Do you remember the name of the defendant in that matter, sir?

A I do.

MR. SHERR: Objection.

THE COURT: I will allow it.

MR. SHERR: Respectfully except.

Q What was the defendant, sir?

A Charles Dunbar.

Q Whom did you represent in that matter, sir?

A The tenant.

Q Who was the tenant, sir?

A Charles Dunbar.

Q Do you see Charles Dunbar here in this room?

A Yes.

Q Will you point him out, please?

A That's Mr. Mitchell.

Q Do ycu remember the address of the apartment in question?

A It was in the East 60's in Manhattan. I don't remember the exact address.

Q Mr. Pravda, I direct your attention to July 17, 1972. At that time did you receive a check from anyone?

MR. SHERR: I objec: to whether he received a check in July of '72 from anyone.

THE COURT: I take it the proof is going to be it's signed in the name of Charles Dunbar?

MR. PADGETT: No, sir, that will not be proved.

THE COURT: It will not? I take it it's for proof of who signed it.

MR. PADGETT: No, sir.

If the Court would like, I can make an offer of proof.

THE COURT: Well, go ahead. I don't see anything yet that is getting into --

MR. SHERR: Except if he received a check in July of '72. We are still under indictment for moneys supposedly received in '71 that weren't reported. What difference would it make if he received a check in July of '72?

MR. PADGETT: Your Honor, one of the Government's prime burdens in this is to show the defendant's intent and wilfulness.

MR. SHERR: If your Honor please --

MR. PADGETT: Please, Counsel, may I finish my statement just as you were allowed to finish yours?

THE COURT: Yes, Mr. Sherr.

At this time your objection is overruled. I will allow the question to be answered.

MR. SHERR: Respectfully except.

Q Did you receive a certain check on July 17 of

1972?

A I can't certify to the date, but in July of '72 I did.

Q From whom did you receive this check?

MR. SHERR: I object.

THE COURT: I will allow it.

MR. SHERR: Respectfully except.

Q From whom did you receive this check, sir?

A My best recollection is that I got it from Susan Hall.

Q DO you remember to whom the check was made out?

MR. SHERR: If your Honor please, I must renew my objection. This is income in the year -- at best it can be linked to income in the year 1972 by somebody.

THE COURT: Mr. Sherr, when all of this is in, let's find out what the area is. If it's relevant, we will strike it. If it's not relevant we will keep it.

Overruled.

MR. SHERR: Instead of getting up each time, may I have a continuing objection?

THE COURT: Yes.

I do want to say this to you, that I have been assuming that there was nothing by way of communication involved in any of these documents. If you get to a

point where you have an argument concerning the attorney-client privilege, I will expect you to assert that specifically, but I will permit you a continuing objection to this check, what is on it, and what was done with it.

Go ahead.

Q Will you tell us to whom that check was made out?

A It was made out to Porcupine Productions, Inc.

Q Di you represent Porcupine Productions at the time?

A I did.

Q In what capacity, sir?

A As its attorney.

Q Can you tell us who the principals were in Porcupine Productions, Inc.?

A James Mitchell.

Q When was Porcupine Productions created?

MR. SHERR: I have to object to this. Now we are getting into the attorney-client relationship, if it please your Honor.

THE COURT: I think that is something that is -- is this a corporation? Can we get a certificate filed with the Secretary of State somewhere?

MR. SHERR: That is another, that is proof --

THE COURT: I know, but it's not a matter, there-

fore, of a confidential communication.

MR. SHERR: The certificate that was filed with the Secretary of State does not necessarily list the officers and directors. The certificate usually lists --

THE COURT: He has asked, Mr. Sherr, when the corporation was formed, what was the date.

MR. SHERR: He has also asked who the officers of the corporation were, and whether the defendant was involved with the corporation.

THE COURT: He said he was, he was a principal.

MR. SHERR: I am objecting to that, and move to strike that out. I am saying he is barred in the area. I don't want to jump up every question, but we are getting into a situation where I am not that fast, your Honor. I just can't get up that fast each time.

He is going into this attorney-client relationship. The certificate filed with the Secretary of State merely lists the name of the incorporators, and it is usually the name of the attorney. It has nothing to do with who the officers or directors are.

THE COURT: I will deny the motion to strike and overrule the objection to when the Porcupine Productions, Inc. was formed.

You may answer, sir.

Q When was the corporation formed, sir?

A I don't remember the exact date, but it was formed, my recollection is, some time in 1972.

Q In 1972 , did you receipt moneys received by Porcupine Productions?

MR. SHERR: I am sorry. What was that question?

THE COURT: Were moneys received by Porcupine Productions in 1972.

MR. SHERR: Did he receive moneys?

MR. PADGETT: I will rephrase the question.

Q Did you prepare a certain receipt representing moneys received by Porcupine Productions?

A I did.

Q Sir, I show you this Xerox copy. Do you recognize it?

A I do.

Q How do you recognize it, sir?

A It's written in my handwriting, and I signed it.

MR. PADGETT: May this be received as Government's Exhibit 14 for identification.

(Government's Exhibit 14 was marked for identification.)

Q Do you know what happened to the original of that document?

xx

A Yes, this was a receipt, and I gave it to Susan Hall.

Q You gave the original to Susan Hall?

A The original to Susan Hall.

Q Prior to giving that receipt to Susan Hall, did you have a conversation with Mr. Mitchell?

MR. SHERR: Objection.

THE COURT: I will allow it.

Overruled.

A I did.

Q Can you tell us what that receipt represents?

MR. SHERR: Objection if it in any way involves the attorney-client privilege, because what that receipt represents -- I have to object to the form of the question. I don't know what he is calling for.

THE COURT: Yes, I will sustain the objection as to form.

Q Did you have a conversation with Miss Hall at the time you tendered her that receipt?

A I did.

Q Was Mr. Mitchell present?

A I don't believe so, no.

Q Did Mr. Mitchell instruct you with respect to that receipt?

MR. SHERR: Objection, what Mr. Mitchell --

THE COURT: Just yes or no.

THE WITNESS: Did he instruct me?

THE COURT: Just yes or no.

A Yes.

Q Did you thereafter give a receipt to Miss Hall?

THE COURT: Let me see that.

(Paper handed to the Court.)

THE COURT: I think Mr. Sherr might be correct in his assertion of the attorney-client privilege.

Mr. Pravda, did Mr. Mitchell say anything to you with regard to this receipt concerning what was to go into it? Just yes or no.

THE WITNESS: Yes.

THE COURT: Again just yes or no to this question: Did he tell you that you were to deliver that receipt to some third party?

THE WITNESS: Yes.

THE COURT: All right, you may answer the question as to what he instructed you with regard to the receipt.

MR. SHERR: I must have an objection to that, your Honor. I feel that is a violation of the attorney-client privilege.

THE COURT: This was a communication intending

to be communicated to a third party, and therefore I do not feel it's a confidential communication.

MR. SHERR: Your Honor, with all due respect, your Honor went beyond that. Your Honor asked him if he instructed him as to what was to go into the receipt.

THE COURT: And that he was to pass that receipt with that contents on to a third person.

MR. SHERR: We don't know whether or not the instructions that he got from Mr. Mitchell, and what that receipt eventually contained, whether by negotiation or otherwise, was the same; and we are getting into a very dangerous area here, your Honor, because we are being placed in a position where we can't rebut without opening the door.

THE COURT: I overrule the objection.

MR. SHERR: Respectfully except.

Q You say that Mr. Mitchell gave you certain instructions?

A He did.

Q Did you carry out those instructions?

A I did.

Q Were those instructions --

MR. SHERR: I have to object and move to strike that out.

THE COURT: Yes, strike it out.

Following the receipt of instructions, what did you do?

Q Following the receipt of the instructions, what did you do?

A I issued this, the original of this receipt.

THE COURT: Exhibit 14 for identification?

THE WITNESS: Exhibit 14 for identification to Miss Hall, who had asked me --

MR. SHERR: I object to anything Miss Hall said.

THE COURT: To Miss Hall, period.

THE WITNESS: I issued it to Miss Hall.

THE COURT: Do you offer it in evidence?

MR. PADGETT: Yes, sir, I offer that previously received as 14 for identification as 14 in evidence.

MR. SHERR: May I see it, please?

(Paper handed to Mr. Sherr.)

THE COURT. What is the date on it, Mr. Padgett?

MR. PADGETT: July 17, 1972.

MR. SHERR: I have to object to this, firstly, on the ground that it's a transaction which occurred in July 1972.

Secondly, it's a communication signed by Porcupine Productions, Incorporated by somebody as agent.

I am not aware that an agent has the power to bind a corporation. My own personal experience is that it must be signed by an officer or director having authority to bind the corporation, and as such, any document signed by an individual as an agent for a corporation is not binding. It's not a valid document.

MR. PADGETT: Your Honor, that was precisely my purpose in inquiring of the witness whether or not he prepared this at the request of Mr. Mitchell.

THE COURT: To which his answer was he did.

MR. SHERR: He signed it. It's signed by him, by the attorney as agent for the corporation.

THE COURT: I will allow it.

MR. SHERR: Respectfully except.

(Government's Exhibit 14 was received in evidence.)

xx Q Mr. Pravda, I direct your attention to August 1st, 1972. At that time did you prepare a certain check?

A I did.

Q On whose account was that check drawn?

MR. SHERR: I have to object as to a check being drawn in 1972. We are still under indictment for moneys received and not reported, allegedly, in 1971.

THE COURT. Inasmuch as at this point this may have a bearing upon the receipt of moneys in 1971, I will allow it.

MR. SHERR: There has been no connection established, your Honor.

THE COURT: Mr. Sherr, you are right, and I await the connection.

Q Did you prepare such a check, sir?

A I did.

Q On whose account was that drawn?

A Porcupine Productions, Inc.

Q Do you know for how much that check was?

A I do.

MR. SHERR: I have to object on the ground it makes no difference. Porcupine Productions is not a defendant in this action.

THE COURT: Mr. Mitchell is a principal and is involved in its operation.

I will allow it.

MR. SHERR: It was established that he was an officer. That doesn't make him responsible for Porcupine Productions whatsoever under any legal theory, unless it's for withholding taxes or fraud of some kind on behalf of the corporation which he participated in. There is no

allegation of fraud here on behalf of the corporation.

THE COURT: I will allow it.

MR. SHERR: Respectfully except.

Q I show you this Xerox copy of a check, sir. Do you recognize it?

A I recognize it, yes.

Q How do you recognize it, sir?

A I have the original.

Q May I see the original?

A Which was subpoenaed.

Q May I see the original, sir?

(The witness handed a paper to Mr. Padgett.)

THE COURT: Unless there is an objection to this on the ground it is not the best evidence, do you have any objection to looking at the Xerox?

MR. SHERR: Yes, I have to object on every ground I can think of, and a few others.

13 THE COURT: Mr. Sherr, all I asked is whether you would insist upon the use of the original. If you do, we will use it, if not, we can let --

MR. SHERR: That doesn't disturb me. I mean the original or a copy.

THE COURT: That is what I thought.

MR. SHERR: I am objecting on the grounds I have

already enumerated.

THE COURT: I appreciate that.

MR. PADGETT: Will you concede, Counsel, that this, which will be marked as 15 for identification, is a true and accurate Xerox copy of the original?

MR. SHERR: If you say so, I will take your word for it.

MR. PADGETT: Well, sir, I may say a lot of things, but I would prefer --

THE COURT: Mr. Padgett, you have a concession that you may use the Xerox instead of the original.

MR. PADGETT: Thank you.

(Government's Exhibit 15 was marked for identification.)

xx Q Mr. Pravda, you say that you made out a certain check for $850 on the 1st of August; is that correct?

A Yes.

Q And Government's Exhibit 15 for identification was that check; is that correct?

A That's correct.

MR. SHERR: It's in evidence, isn't it? Isn't it in evidence now?

MR. PADGETT: No.

MR. SHERR: You didn't put it in?

THE COURT: If you offer it, it will be received on the same basis.

Mr. Pravda, let me see that.

(Paper handed to the Court.)

MR. SHERR: The objection I made before was that I thought it was being offered in evidence at that time, so I renew the objection.

MR. PADGETT: Since the objection has been made, I will offer it for evidence, your Honor.

THE COURT: It may be received.

MR. PADGETT: Thank you, sir.

(Government's Exhibit 15 for identification was received in evidence.

Q Sir, prior to making this check, had you received a sum of money?

A I had.

Q How much money had you received?

MR. SHERR: I object. The fact that he may have received the money from somebody --

THE COURT: I will allow it subject to connection.

Overruled.

MR. SHERR: Respectfully except.

Q From whom had you received money?

A It was the $1000 that you asked me about earlier.

MR. SHERR: Excuse me. May we have the year at least? Are we still in 1972?

THE WITNESS: In 1972, in July, that you asked me about earlier, from Susan Hall.

Q The sequence then is Susan Hall gave you $1000 --

MR. SHERR: Now, I object to counsel leading the witness as to the sequence.

THE COURT: I think there has been some testimony as to all of these points without leading.

Go ahead, Mr. Padgett.

Q Do you know what happened to the check that Miss Hall gave you?

A Yes.

Q What happened to it?

MR. SHERR: Same objection.

THE COURT: Overruled.

Q What happened to it?

A I deposited it in the account of Porcupine Productions.

Q And thereafter you drew a check on Porcupine Productions; is that correct?

A That's correct.

MR. SHERR: I assume we are still in 1972.

THE COURT: This is the same one that is already in evidence, Mr. Sherr. He is just tracing the one check into a bank account and out.

Go ahead.

Q This is Government's Exhibit 15; is that correct?

A That's correct.

Q To whom is that check, that is to say, Government's Exhibit 15, made out?

A James Edward Mitchell IV.

Q I draw your attention to the reverse.

Can you tell us who signed that check?

A It's endorsed by James Edward Mitchell IV and then by myself.

Q Were you present when that endorsement was made?

A Yes.

Q Who made that endorsement, sir?

A James Edward Mitchell IV.

Q The defendant?

A The defendant.

THE COURT: May I see it?

THE WITNESS: And I made the other endorsement.

(Exhibit handed to the Court.)

Q Sir, you stated that Mr. Mitchell was a principal in Porcupine, did you not?

A I did.

Q Were there any other principals in Porcupine Productions?

A No.

MR. PADGETT: Thank you very much, Mr. Pravda. No further questions.

THE COURT: Do you have any 3500 material?

MR. PADGETT: No 3500 material.

THE COURT: Mr. Sherr, we will take a 10-minute recess.

MR. SHERR: Before you take a recess, I have no questions of this witness.

I want to renew my motion to strike his testimony, particularly with reference to the exhibits offered, 14 and 15, in that the Government has not in any way connected these 1972 transactions with anything that may have occurred in 1971.

THE COURT: I will reserve decision.

(Recess.)

MR. PADGETT: The Government calls Nancy Sauer to the stand.

- -

ANNA FREDERIKA SAUER, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PADGETT:

Q You told us your name is Anna Frederika Sauer?

A Yes.

Q Are you know by any other names?

A Yes, Nancy.

Q Have you ever been known by the name Nancy Sauer?

A Yes.

Q When and where were you born, Miss Sauer?

A I was born in Amsterdam, Holland.

Q When was that?

A May 30, 1952.

Q When did you leave Holland?

A I was two years old. It was September 1954.

Q With whom did you leave Holland?

A With my parents and with my twin sister, Ina.

Q Where did you go?

A To Canada, Toronto.

Q Did you then live in Toronto?

A Yes, I did.

Q Have you any brothers or sisters other than the twin that you just mentioned?

A I have one other sister and three brothers.

Q With whom did you live in Toronto?

A With my parents.

Q Did you attend school in Toronto?

A Yes.

Q Which schools did you attend?

A General Brock School and W. A. Porter Collegiate.

Q Did you finish high school?

A No, I didn't.

Q When did you leave high school?

A In the middle of Grade 11.

Q What did you do after you left high school?

A I worked in an insurance company.

Q In what capacity?

A Pardon?

Q In what type of job did you work?

A It was general office work.

Q For how long did you work for the insurance company?

A For about a year.

Q What did you do when you left?

A I didn't work.

Q Why did you leave?

A I don't know. I just didn't like my job.

Q What did you do after you left the insurance company?

A I started working at --

Q In what capacity?

A Pardon?

Q What did you do?

MR. SHERR: If your Honor please, at this time I respectfully request the Court to admonish the witness or to advise the witness that she has a right to assert the Fifth Amendment.

MR. PADGETT: Objection, your Honor. I think counsel is attempting to coerce the witness.

THE COURT: I don't think this is your position to assert, is it?

MR. SHERR: Pardon me? I don't hear.

THE COURT: I don't think you have capacity to assert this on behalf of the witness.

MR. SHERR: I am asking your Honor. I am making a request to your Honor to advise the witness of her constitutional rights. I am not advising the witness.

MR. PADGETT: Your Honor, this in my opinion is a blatant attempt to coerce the Government's witness.

However I have no objection should your Honor wish to advise the witness. She has already been advised many times of this.

THE COURT: You are sworn here, Miss --

THE WITNESS: Anna Sauer, that is my real name, yes.

THE COURT: Miss Sauer --

THE WITNESS: But I have been called Nancy ever since I was two years old. That's why --

THE COURT: Miss Sauer, you recognize, do you not, that if there is an answer to a question that may tend to incriminate you, that you have the right to assert a privilege against self-incrimination under the Fifth Amendment of the United States Constitution?

THE WITNESS: That means if I find something discriminating to me, I don't have to say it?

THE COURT: If you believe that an answer to a question would tend to incriminate, you have a right to decline to answer that question.

THE WITNESS: Okay.

THE COURT: You are aware of that, are you not?

THE WITNESS: Pardon me?

THE COURT: You are aware of that right, are you not?

THE WITNESS: Yes, I am.

THE COURT: Did you confer with counsel before coming here?

THE WITNESS: Yes, I did.

THE COURT: You may go ahead.

14 MR. PADGETT: Thank you.

Q What did you do?

MR. SHERR: Just for a point of clarification, your Honor, for my own information, may I ask the witness, when she referred to counsel, is she referring to Government counsel?

THE COURT: No, no, this is inappropriate. You take your seat, please, sir.

Q What did you do after you left the insurance company?

A I became a prostitute.

Q Where did you become a prostitute?

A In Toronto.

Q How old were you then?

A 18.

Q What type of prostitution or what type of business was it that you were engaged in at the time?

A Well, first I worked on the streets and then --

MR. SHERR: I am sorry, your Honor, I can't hear

the answers.

Q You will have to speak up.

A I worked on the streets first, and then I had a telephone business.

Q Is there a difference between working on the streets and having a telephone business?

A Yes, there is a lot of difference.

MR. SHERR: Excuse me, may I -- I am having difficulty.

May I go up?

THE COURT: You certainly may.

Q Will you tell us the difference between working on the streets and having a telephone business?

A On the streets you proposition your men, you proposition your men, and on telephone it's -- it's different. They proposition you more or less.

Q On the telephone you are called up by the men; is that correct?

A Yes.

Q Which is considered to be a better business?

A Yes.

Q Is the telephone business considered to be a better business for a prostitute than working the streets?

A I think it is.

Q Have you ever been arrested?

A Yes, I have.

Q Were you arrested in Canada?

A Yes, I was.

Q With what were you charged?

A Bawdy house.

Q Can you tell us exactly what that is?

A Bawdy house is having a house.

Q A house of prostitution?

A Yes.

Q Were you convicted?

A Yes, I was.

Q Did you go to jail?

A No, I got fined.

Q Did you pay the fine?

A Yes, I did.

Q What happened after you were arrested and convicted?

A Pardon?

Q What happened after you were arrested and convicted?

A I moved back home with my parents, and I was still working a little bit.

Q When you say working a little bit, working as

a prostitute?

A Yes, and I have my steady customers, so I was still doing that.

Q Did there come a time in May of 1971 when you left Toronto?

A Yes, I decided to leave. I just wanted to go awawy, so I went to Montreal for a vacation, for a visit.

Q Did you intend to visit any particular person?

A Yes, I visit my sister.

Q How long did you intend to stay?

A Just for a few days.

Q Was there any reason why you intended to stay for only a few days as opposed to a longer period?

A Well, because I had somebody to see Thursday.

Q When you say you had somebody to see Thursday, would that have been a social or business meeting?

A Business.

Q Business?

A Yes.

Q Was it a steady customer?

A Yes, it was.

Q You didn't want to miss him, did you?

A No.

Q Was this a business or a social visit with your

sister?

A It was social.

Q At that time was your sister a prostitute?

A Yes, she was.

Q How did you get to Montreal?

A A friend of the family was going up to Quebec, or he was going up that day, so he drove me to Montreal.

Q Do you know where your sister was staying?

A She was -- I can't recally remember. I know it overlooked a park. It was a big high-rise building.

Q When did you arrive at your sister's apartment?

A I am pretty sure it was Thursday night.

Q What did you do?

A Well, I slept, and then Friday afternoon we went shopping. Then Friday night we went to some of the discothques.

Q Did anything particular happen on that Friday night?

A Yes.

Q What happened?

A I met a man.

Q Do you see the man here in court?

A Yes, I do.

Q Point him out, please.

A Right there.

Q You mean the gentleman in the --

A The one behind the lawyer.

MR. PADGETT: May the record reflect the witness has identified the defendant.

THE WITNESS: In the pinkish colored jacket.

THE COURT: Yes.

Q Tell us what happened.

A I met him. We sat down and we talked, and he told me he was from New York.

Q Continue.

A nd we knew some of the same people.

Q Who?

A Well, he knew some of my girl friends that I knew.

Q What are their names?

A Janet and Gayna.

Q Do you know what business if any those girls were in?

A Yes, they were prostitutes.

Q Where were they prostitutes?

A I think in New York.

Q Had they been prostitutes in Canada?

A Yes.

Q What else did you talk about? Let me rephrase the question.

Did you talk about Janet and Gayna inside this club?

A Yes.

Q Did you go anywhere after you were in the club?

A I think we went to eat.

Q And then what happened?

A Then we went back to his apartment, I mean his hotel, because we stayed in a hotel.

Q Did you spend the night with him?

A Yes, I did.

Q And did you leave his hotel room?

A Yes, next mornint I left.

Q Where did you go?

A I went back to Ina's house, and then that night we went out again.

Q When you say "we," whom do you mean?

A Me and Ina.

Q Did you see the defendant that night?

A No, I was supposed to phone him, but I forgot his room number.

Q Did there come a time when you saw him again?

A Yes, Sunday afternoon.

Q Did you talk with the defendant on Sunday afternoon?

A Yes.

Q What did you talk about?

A He was mad at me because I didn't phone him.

Q Did you ever tell the defendant that you were a prostitute?

A I think I did.

Q Did he say anything to you?

A Well, he told me he was from New York, and he would like me to come down.

Q Why did you go with him?

A Because like I was getting tired of Toronto, and I could, you know -- I really needed a change because I always wanted to go down to New York, but I really didn't know anybody down here, so I --

Q I am sorry.

A I thought it would be a nice idea, see what it was like.

Q When did you go to New York?

A It was about May 20th, May 23rd.

Q Do you remember which day of the week it was?

A Well, we got here on a Tuesday.

Q Was that the Tuesday following the Saturday

that you first met him?

A Yes.

Q How did you get to New York?

A I flew.

Q Do you know which airline?

A I can't remember. I think it was Air Canada. I can't remember.

Q Which city did you fly from?

A Montreal.

Q Did you fly alone or did you fly with someone?

A Well, I flew alone. Well, I flew with Porky, but we went two separate --

Q When you say Porky, who is Porky?

A Mr. Mitchell.

Q Describe just how you boarded the airplane and what happened on the airplane, and your flight down.

THE COURT: Have we established the year of this?

THE WITNESS: It was 1971. I am sorry.

A Well, we went separate. I didn't have no money, so he gave me some money, because you have to have money to cross the border, and I bought my ticket and I got through the Customs and Immigration.

Q When you went through Customs and Immigration,



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were you with the defendant?

A No, I wasn't.

Q Did you board the airline?

A Yes.

Q After you boarded the airline, did you join the defendant?

A After it took off we sat together, yes.

Q And you sat with him on the way down to New York, did you not?

A Yes.

Q When you got to New York, what happened?

A A limousine picked us up.

Q Where did it take you?

A First we went to a lady's house.

Q When you say a lady, do you mean a prostitute?

A Yes.

Q Where was that?

A I think it was up in the 80's. I am not sure.

Q Do you remember the girl's name?

A Sandy.

Q What happened then?

A Then we went back to his place.

Q Where was that?

A On 14th and Fourth.

Q How long did you stay there?

A Together? About two months.

Q That particular night.

A That night, I stayed there all night. I mean that day. We got there Tuesday afternoon.

Q Did there come a time when you left that apartment that night?

A Yes, about 10, 11 o'clock.

Q Prior leaving the apartment, did the defendant introduce you to anyone?

A No. Before I left the apartment?

Q Yes.

A Yes, Janet came over.

Q Did you have a discussion with the defendant prior to being introduced to Janet?

A Discussion about what?

Q Well, let's take it step by step.

A Okay.

Q You went back to his apartment on 14th Street, right?

A Yes.

Q What happened?

A Well, we laid down for a few hours because we were tired from our trip.

Q What happened then?

A And Janet came over. I got dressed, and Janet came over and we went out to a --

Q Did the defendant say anything to you before you went out with Janet?

A Not -- you know, this is three years ago. I can't really recall. I mean I can't really recall.

Q Why did you go out?

A He probably did, but he just told me somebody was coming to pick me up, you know, for me to get dressed.

Q Did he say why someone was picking you up?

A Yes.

Q Why?

A To go out and work.

Q Janet came by and picked you up?

A Yes.

Q Did you go out and work that night?

A Yes.

Q Where did you work?

A 49th and Lexington.

Q Doing what?

A Prostitute.

Q How many dates did you have that night?

A I think I had three.

Q How much money did you make?

A About $100.

Q What did you do with the money?

A I gave it to Mr. Mitchell.

Q All of it?

A Yes.

Q You stayed with Mr. Mitchell for a period of time, did you not?

A Yes.

Q For how long?

A Well, it was -- with him or in his apartment?

Q In his apartment.

A About two months.

Q And at the end of the first month did something happen?

A Yes, I left.

Q During that first month, did you work as a prostitute?

A Yes, I did.

Q How often did you work?

A Well, first it was six nights, six days a week, because I thought I don't work Sundays, that's the rest day.

Q Then what happened?

A But then I had to work seven nights.

Q Who told you to work seven nights?

A He did, because his other girls were working seven nights, so I had to work seven nights.

Q How much money did you make on the average each night?

A About $150 a night.

Q What did you do with that money?

A I gave it to Mr. Mitchell.

Q All of it?

A Yes.

Q Tell us what happened after that first month?

A I split. I left.

Q Did you go back to him?

A Yes.

Q Did you work for him for another month?

A Yes, I did.

Q How many nights a week did you work?

A Seven.

Q How much did you make per night?

A About $150.

Q Did you turn it over to Mr. Mitchell?

A Yes, I did.

MR.SHERR: Your Honor, I have been refraining from objecting, but it's getting a little too leading now.

The questions are, "Did you turn it over to Mr. Mitchell," and that sort of thing, and counsel is now testifying.

THE COURT: Try to avoid that, Mr. Padgett.

Q What did you do with the money?

A I gave it to Mr. Mitchell.

Q All of it?

A Yes.

Q During this two-month period, what did Mr. Mitchell do for you?

A Well, if I got busted he paid my fines and got me out of jail.

Q Anything else?

A No.

Q Did he give you any money?

A He gave me expense money.

Q How much was that?

A About 10, 20 dollars a day, 10 dollars.

Q I am sorry?

A $10 a day.

Q Did he buy you any clothes?

A No.

Q When you say expense money, what was the expense money?

A That's for like cab money and cigarette money, and nylons that we have to buy.

Q You worked for Mr. Mitchell for two months at his apartment; is that correct?

A I was staying at his apartment, yes.

Q Did there come a time when you left his apartment?

A For good, or you mean -- after two months?

Q Yes.

A Yes, because I moved to another one of his apartments on 82nd and Lex.

Q Did you work while you were in that apartment?

A Yes, I did.

Q In what capacity did you work?

A What do you mean capacity?

Q What were you doing?

A I was still working on the streets.

Q You were still a prostitute?

A Yes.

Q Did you make money while you were in that apartment?

A Yes, I did.

Q What did you do with that money?

A I gave it to Mr. Mitchell.

Q All of it?

A Yes.

Who paid the rent on that apartment?

A Well, I was supposed to pay the rent, but I left him before the next rent day came.

Q Did there ever come a time when you had any conversation with lawyers?

A With who?

Q Any lawyers?

A With lawyers?

Q Yes.

A When I got busted.

Q Do you know who paid the lawyers' fees?

A I think Mr. Mitchell did, or one of the other girls who came down.

Q For how long a period of time did you work as a prostitute for James Mitchell?

A Three months.

Q How much money did you make during those three months?

A Well, about $10,000, I guess.

Q What months were those?

A June, July, and August.

Q What year?

A L971.

Q What did you do with that $10,000?

A I gave it to Mr. Mitchell.

Q How much money did you get back from him?

A None, not in like money-money, sort of thing.

Q I show you this photograph.

Do you recognize anyone therein?

A Yes, it's a girl I know as Sandy.

Q That is Sandy?

A Yes.

Q Is that the Sandy you mentioned before tous?

A Yes.

Q Do you recognize anyone else in that photo?

A I think it's Porky, Mr. Mitchell. I could just tell by the side.

MR. PADGETT: May this be received as Government's Exhibit 16 for identification.

(Government's Exhibit 16 was marked for identification.)

xx Q I show you this photo.

Do you recognize it?

A Yes.

Q Who is that?

A Janet.

MR. PADGETT: May this be received as Government's Exhibit 17 for identification.

(Government's Exhibit 17 was marked for identification.)

Q I show you this photo.

Do you recognize the persons thereon?

A Yes, that's me.

Q I am sorry?

A That's me.

Q Who else is there?

A Porky, Mr. Mitchell.

MR. PADGETT: Government's Exhibit 18 for identification.

(Government's Exhibit 18 was marked for identification.)

Q I show you this photo.

Do you recognize it?

A It's me.

Q It's you also?

A That's me.

Q When you say that is you, you mean the two photos are both you; is that correct?

A Yes, they are the same girl, me.

MR. PADGETT: May these be received for iden-

tification.

(Government's Exhibit 19 was marked for identification.)

xx THE WITNESS: That is my sister and I.

Q On this photo, do you recognize the people?

A Yes, it's my sister and I.

Q That is your sister Ina that you told us about before?

A Yes.

MR. PADGETT: May this be received for identification.

(Government's Exhibits 20 and 21 were marked for identification.)

xx Q I show you this photograph.

Do you recognize the persons thereon?

A Yes, Janet and Mr. Mitchell.

MR. PADGETT: May this be received as 22 for identification.

(Government's Exhibit 22 was marked for identification.)

xx Q I showed you this photo before. Do you recognize it?

A That's Sandy and Mr. Mitchell.

MR. PADGETT: May this be received for identi-

fication.

(Government's Exhibit 23 was marked for identification.)

xx Q I show you this photo and ask you if you recognize it.

A That's Sandy.

Q Sandy also?

A Yes.

(Government's Exhibit 24 was marked for identification.)

xx Q When you talked to us before about a girl named Gayna and a girl named -- what was the other girl's name?

A Janet.

Q -- Janet, did you see Janet's photo in here?

A Yes, the ones you showed me?

Q Yes.

A Yes.

Q Which photo was that?

A This one.

Q You are referring to Exhibit 17 for identification?

A Yes.

Q You had conversations with each of the girls on these photos, including your sister?

A Did I ever talk with them?

Q Yes.

A Yes.

Q Do you know what they did for a living?

A Yes.

Q What?

A They were prostitutes.

Q Do you know if they worked for any particular person?

MR. SHERR: I object to this as calling for a conclusion.

THE COURT: Yes, I tend to think you are right. Sustained.

Q Miss Sauer, I show you this book.

Have you ever seen it?

A Yes, sir, I have.

Q Have you had occasion to read it?

A I read it when it first came out.

MR. PADGETT: May this be received as 25 for identification.

(Government's Exhibit 25 was marked for identification.)

xx Q Did you read it in hard bound or soft back?

A When it was hard bound.

Q When it was hard bound?

A Yes.

Q There were photos in the hard bound edition, were there not?

A Yes, there was.

Q Did you recognize any of the photos in that hard bound edition?

A Most of them.

Q Did you recognize yours?

A Yes, after I looked hard.

Q Would you go through Exhibit 25 for identification and see if you see any photos of yours in there?

A IN this one?

Q Yes.

A Well, right on the front cover, that's me.

Q I am sorry.

A On the front cover.

Q Right on the front cover?

A Yes.

Q Down in the lower left-hand corner?

A Yes.

Q That shows two girls together; is that correct?

A I have to see which. This one is me.

Q Which one is you?

A This one.

Q The one on the right?

A Yes.

Q Who is the one on the left?

A My sister.

Q Your sister Ina?

A Yes.

Q Who is the girl directly to your right?

A Kitten.

Q Kitten?

A Yes.

Q Who is the girl to her right?

A Sandy.

Q And who is the gentleman above all three girls?

A Mr. Mitchell. There is four girls.

Q I am sorry?

A There is four girls.

Q I am sorry?

A There is four girls and Mr. Mitchell.

Q Did Mr. Mitchell ever have any nicknames, to your knowledge?

A I knew him as Porky.

Q Any other name?

A No. In the book he is called Silky.

Q Did you ever call him Silky?

A No.

Q Did you ever hear anyone call him Silky?

A Not until the -- no.

Q I am sorry?

A No, not until the book came out.

Q I am sorry?

A Not until the book came out.

Q After the book came out, did you hear people calling him Silky?

A A few people, yes.

Q Did he respond?

A Who, you mean calling him Silky?

Q Yes.

A No, we referred to him as Silky, but they were talking about Mr. Mitchell.

Q Did you ever hear anyone call him Silky?

A No.

MR. PADGETT: I have no further questions at this time.

THE COURT: Are you offering those pictures in evidence?

MR. PADGETT: Not at this time, your Honor.

Your Honor, at this time I apologize for the fact

that this is somewhat uncoordinated, but we were laboring under a misapprehension this morning. At this time I would make available to counsel the complete grand jury testimony of the witness in -- and again I apologize -- in about 70 pages. I realize that this may pose a problem to counsel to examine it for purposes of cross-examination, and I suggest to the Court that if counsel could just bear with us for a moment, the next witness, your Honor, I believe there will be an application made on behalf of the witness prior to that witness' being sworn, which application will not be made by counsel but rather an attorney for the witness, and to which application I don't believe the defendant would be a part.

Of a consequence, with the Court's permission, I would make this 3500 material available to counsel. If we could excuse the witness while counsel peruses this material, call the next witness, and make whatever arguments have to be made while counsel in fact examines this, perhaps we can expedite matters.

MR. SHERR: Except to this extent, your Honor, if it's 70 pages I am not going to be able to peruse it over here in a few seconds. I would like an opportunity to cross-examine this witness tomorrow to give me a chance to study this 70 pages tonight, and of course if he wants

to continue with the next witness, I have no objection to that, so we won't waste the Court's time.

THE COURT: Do you want to do that?

MR. PADGETT: Except, your Honor, since we were caught rather unawares this morning, this is the only copy of the material that I have.

MR. SHERR: I will be responsible for it.

MR. PADGETT: I am sure you will be, Counselor, but my point is, your Honor, if that be the Court's decision, perhaps counsel could accompany Agent Clarke over to my office while we Xerox a full set of these for the defendant, and then he could continue his examination.

MR. SHERR: That is all right.

THE COURT: What you are saying is let's excuse Miss Sauer for tonight and give you the grand jury minutes overnight, and we will start with the next witness, who apparently is presenting legal problems that are going to have to be resolved?

MR. SHERR: Yes, that will give me an opportunity.

THE COURT: That will give you an opportunity overnight to study the 3500 material.

MR. PADGETT: If that is the Court's decision, I should like to bring something to the Court's attention

at a side-bar conference with counsel on the record.

(At the side bar.)

MR. PADGETT: Your Honor, I am sure that neither counsel or Mr. Werner as co-counsel are aware of this, nor have they participated in it in any way. However, I have been informed by Miss Sauer that on at least one occasion she was contacted by telephone by the defendant Mitchell, who sought to speak with her. She did not speak with him, pursuant to my instructions.

However, she has informed me that she is somewhat concerned that additional attempts will be made by the defendant to speak with her.

Again, I make it very clear that I am quite sure there is absolutely no participation by either counsel in this action. I would, however, ask the Court to admonish Mr. Mitchell to refrain from speaking to Miss Sauer, and I would also ask counsel to make the same request of your client.

17 MR. SHERR: I am not going to concede the truth of what --

THE COURT: No, I appreciate that.

MR. SHERR: -- that counsel stated, but the fact is that if she wants to testify under oath, if she wants to testify to that under oath, I will of course advise --

your Honor admonished me -- I will advise -- I have no knowledge --

THE COURT: Why don't you first bring the witness back and right here I will excuse her for the night. I want to speak with her.

Bring the witness here.

MR. SHERR: When is this supposed to have happened?

MR. PADGETT: Today.

MR. SHERR: I didn't even know she was going to be a witness.

MR. PADGETT: He did.

(At the side bar, witness present:)

THE COURT: I am going to excuse you until 10 o'clock tomorrow morning, and I will see you here at 10 in the morning.

THE WITNESS: Okay.

THE COURT: Overnight, if anybody endeavors to speak to you about this case, or your participation in it in any way, you are not to speak to them, and you are to report it to me in the morning.

THE WITNESS: I will.

THE COURT: All right.

Overnight, as I say, if anyone endeavors to speak

with you, do not speak with them about it.

THE WITNESS: I won't.

THE COURT: And report it to me in the morning if that occurs.

THE WITNESS: Okay, I will.

THE COURT: All right, see you in the morning at 10 o'clock.

(Witness excused.)

THE COURT: Bring your client here. I want your client here.

(At the side bar, defendant present.)

THE COURT: Mr. Mitchell, in connection with any witness in this case, of course I hardly need say to you that it is inappropriate to endeavor to have any contact with them with regard to what they are going to testify on the trial.

I have heard some statements made here, and without giving them any credit, I just want to put a direction on the record in your presence that overnight you are not to try to speak with this young lady or have anybody speak to her on your behalf. In other words, not directly or indirectly through any friend or otherwise, and I have directed her to report to me in the morning as to any such effort.

I am not saying that that is happening, but I just wanted to be perfectly clear that that must not happen. Your counsel has said that they would.

MR. SHERR: Yes, I concur in that.

THE COURT: They have undertaken, as far as they can undertake, to do it, to speak to you in that regard, but I want the Court's direction to you to be fairly clear.

THE DEFENDANT: Fine.

(In open court.)

MR. PADGETT: Your Honor, the Government calls Susan Hall to the stand.

MR. JOEL GORA: Your Honor, if it please the Court, my name is Joel Gora, and I am an attorney with the American Civil Liberties Union. I am representing Miss Hall, who has been subpoenaed earlier today as a witness in this case.

As I believe your Honor's chambers is aware, we hoped to be able to make our application either to quash the subpoena or modify it for a protective order on Friday before the case commenced, but circumstances didn't allow that.

We would like to make an application at this time. I am not sure whether your Honor's pleasure is to have argument here or in chambers.

THE COURT: I am prepared right here.

Mr. Gora, my threshold feeling is that until your client is on the stand and a specific question is put, to which you feel that there is a legal bar of some kind, that the issue is not yet raised.

MR. GORA: Well, your Honor, we feel that on certain grounds we are entitled to challenge this subpoena in its entirety.

THE COURT: Tell me those right now.

MR. GORA: The primary ground for challenging the subpoena outright is the Justice Department regulations promulgated, I believe, in October of 1973 and dealing with subpoenas to members of the news media.

One of the issues that I covered in my preliminary negotiations with the Government before the subpoena was issued was the question of whether those guide lines had been complied with.

We wrote a letter approximately 10 days ago to Attorney General Saxbe requesting that he instruct the U. S. Attorney's office here that those guide lines had to be complied with.

Our view on the guide lines is as follows:

They are designed to protect the news gathering process. Miss Hall was engaged in that process, and

whether or not her journalistic enterprise --

THE COURT: You are assuming I know more about this fact situation than I do. You have been living with this. I gather she is the author of this book that is marked for identification as Exhibit 25; is that right?

MR. PADGETT: That's correct, your Honor.

MR. GORA: She is the author of the book, and the book, as I understand it, is a non-fiction book which surveys one aspect of life.

Our contention is that the journalistic enterprise which led toward and produced this book is the same journalistic enterprise that goes forward in daily newspapers, weekly periodicals, monthly magazines, what-have-you.

The journalistic process is a seamless web, whether the end result is a newspaper feature article or a book of this kind, and as a consequence, whatever protections, either constitutional, statutory, or regulatory are available, have to be afforded to authors such as Miss Hall no less than to reporters for daily newspapers.

Based on that premise, it is our position that the Justice Department guide lines have to be followed because --

THE COURT: Tell me about these guide lines so

mbs

that I am fully familiar with what it is you urge about them that are binding.

Could I see the book, 25 for identification?

MR. GORA: The guide lines, your Honor, have been promulgated initially as guide lines. as a less formal set of regulations in 1970. They were formalized in October of 1973, repeating some of the earlier provisions and enactments, new ones, and in fact what they say is, and they are contained in 28 CFR, Section 58.10, and I have appended a copy of them -- I am sorry, your Honor, we may not have supplied a copy, I apologize, but we can -- I have a copy with me.

In an event, the guide lines require that before subpoenas may be issued by any office of the Justice Department to members of the news media, to reporters, certain steps have to be complied with.

There are two steps that we are talking about here:

One is that the regulations require express authorization from the Attorney General, and the second is that no subpoena shall issue unless a number of criteria are met. Those criteria essentially say that the reporter must be the last and only possible source of the information, a kind of a least drastic alternative test.

We have suggested that these guide lines in effect embody a series of First Amendment notions.

Mr. Padgett has indicated to me -- and by the way, I must say for the record Mr. Padgett has been most helpful in our negotiations on this matter -- Mr. Padgett has indicated to me that he in effect requested authorization from the Justice Department, and that verbally it was supplied to him, I assume, earlier today or Friday.

The subpoena was served upon me on behalf of Miss Hall this afternoon at 12.30. I don't know whether the authorization was expressly made by the Attorney General, as the guide lines require.

THE COURT: Why don't we find out.

Mr. Padgett?

MR. PADGETT: Well, your Honor, it seems to me if I can just expand in my reply for a moment, that what counsel is arguing is that hasn't the Department of Justice conformed to its internal policy, and I am not prepared to state to the Court or to counsel that the Department of Justice has or has not conformed to its internal policy.

I note a copy of the guide lines says here in the last paragraph over Mr. Richardson's signature,

"Failure to obtain the prior approval of the

Attorney General may constitute grounds for an administrative reprimand or other appropriate disciplinary action."

There is no statement in there saying that the subpoena is null and void.

THE COURT: Mr. Gora, let me ask you another question which is also on the threshold here, and you gentlemen have been living with this, and I have not, so you are the experts and you have to assist me in this regard.

I would assume that the purpose of these regulations was to protect reporters reporting news stories to the public in terms of keeping the public current with regard to their knowledge as citizens, to enable them to fulfill their functions as citizens and enable the media to serve their function as reporters to the citizenry.

Does this apply to somebody who is writing a biography for profit? Because you have been using the words "news media," and coupling the author of a biography with somebody who is a reporter in the news media.

MR. GORA: Your Honor, the purposes that you identify as beding protected by these regulations are purposes which we submit are advanced by the kind of reporting represented in this book. There have been --

THE COURT: I can see a situation, if I am going to write a biography about Grover Cleveland, for example, and I ask somebody a question, and I get an answer that they would rather didn't become public, I am still in the course of writing a biography about a public figure, although now many, many years ago; and I am just wondering whether this legitimately goes to that.

MR. GORA: The information in this book is virtually identical to the kind of information which has appeared in daily newspaper articles and magazines and so forth; so I think that it participates in the same process.

THE COURT: You may be right, but I am trying to see whether it legally is so.

MR. GORA: The second point is, I don't view it as a biography. I think it contains sketches of a number of individuals.

THE COURT: But it isn't reporting in the newspaper sense. It's a biography for profit by an autho r who gets published by a book publisher.

MR. GORA: But, your Honor, all books or most book are published for profit, as are most newspapers, and it's never been my understanding that the absence or presence of First Amendment protection or regulatory protection, or what-have-you, turns on the profit angle.

I believe this argument was made in New York Times Company against Sullivan, that the ad that was the subject of the libel suit had been paid for by persons unconnected with the newspaper. The Supreme Court rejected that as a basis for denying protection, so I don't think the profit thing matters.

THE COURT: All right.

MR. GORA: The other point I would make about the regulations, and this is cited in a letter to Attorney General Saxbe that has been provided to you at the back of our memorandum of law, the Justice Department in testifying on proposed legislation to protect the news gathering process and so forth, the Justice Department officials themselves expressed some concern about any statute which would limit the protection to daily media, fast media, and deny it from slower media and --

THE COURT: Much like a news magazine or monthly news magazine.

MR. GORA: Exactly right, and we have submitted some affidavits from professional journalists who show that some of the best reporters in the country started out as newspapermen and moved to feature articles every Sunday, moved for whatever reasons to a monthly kind of thing, and then expanded their work into a book.

As a matter of fact, apparently one or two portions of this book appeared in some magazines, some monthly periodicals or monthly magazines, so that I think that if there is any protection available, and whatever its extent may be, it can't be withheld because of the end product here, namely a book.

So that the Justice Department regulations are the main reason that we offer for obviating the need to call Miss Hall at all.

One other thing. Mr. Padgett read the last paragraph of those regulations. There is also a provision in them that if a subpoena is issued without express authorization, it will immediately be withdrawn.

THE COURT: It will what?

MR. GORA: It will routinely be withdrawn.

THE COURT: That isn't happening here.

MR. PADGETT: In fact, it's a bit stronger than that. The guide lines provide the Department will move to quash it of its own motion.

MR. GORA: If a subpoena is obtained without authorization, the Department will as a matter of course move to quash it on its own motion, so that in these guide lines or regulations, and I think they are published in CFR, they look like regulations to me.

THE COURT: Let's take this point right now.

Mr. Padgett, your position is that whether or not you have got an express authority of the Attorney General, if you have not the censure is yours, and the subpoena is valid?

MR. PADGETT: Yes, sir.

THE COURT: That is what it amounts to.

MR. GORA: The regulations seem to say that if express approval is not granted in a case where it's necessary --

THE COURT: The subpoena is invalid?

MR. GORA: That's right.

THE COURT: Is this something that I should be deciding as of this moment, and get on then to the media questions of --

MR. GORA: You can certainly decide that, your Honor, at this point. Short of questions of whether the standards and regulations are --

THE COURT: Do you have the code there?

(Paper handed to the Court.)

MR. PADGETT: Your Honor, I just might point out, if it is counsel's position that a subpoena issued without express authority is invalid, then indeed there would be no need to quash it. It would die of its own lack of

existence, so to speak.

THE COURT: Its invalidity has to be called to my attention.

MR. PADGETT: But presumably you only move to quash a valid subpoena. You only kill something that was alive.

THE COURT: Then Mr. Gora is pointing out to me that it is in fact invalid rather than quashing it. That is procedural, I think.

MR. PADGETT: Very well.

THE COURT: Mr. Gora, I am going to hold that the subpoena is valid.

MR. GORA: May I ask the ground, your Honor?

THE COURT: Yes. I don't see anything in the regulations, order No. 4544-73, that permits an argument that you and your client have standing to quash it for being invalid. It sets out guide lines by which a Government attorney shall conduct himself, and it indicates that if the Government attorney commits misconduct, if I can use the word broadly, that attorney is subject to an administrative reprimand. I do not see that it affords any basis for declaring that the subpoena itself was invalid, so I would deny the motion to quash the subpoena or to declare it invalid, if you want to call it that.

MR. GORA: If I might just add one point for the record on that, your Honor, it is my understanding that the case lawis to the effect that the Government regulations, whether they themselves are consitutionally required, are nevertheless binding on the Government, and that would be the premise for our position on the regulation.

THE COURT: All right.

MR. GORA: The other ground that we would advance, and again I am speaking now in terms of whether Miss Hall should be called to the witness stand at all, should she called then we have questions that we need to raise with your Honor.

THE COURT: I appreciate that.

MR. GORA: The other ground is simply the First Amendment notion that since the enterprise that she was involved in was a First Amendment enterprise, whether or not within those guide lines that we spoke of a moment ago, that her testimony cannot be elicited unless there is some indication that it's the last possible resort, and for preliminary reliance we would cite your Honor to the Baker case in this Circuit decided by Chief Judge Kaufman in the fall of'72. That is 470 F. 2d, which makes it quite clear that only in the most extreme circumstances can a journalist's testimony be compelled in a case.

Finally, the other basis for quashing the subpoena as opposed to seeking its limitation, is the New York Shield Law, Civil Rights Law Section 79(h), I believe, which, my understanding is, provides a more or less absolute privilege for people engaged in the journalistic process that I have been describing.

I will be frank, your Honor, in conceding that the statutory definitions in that statute do not specifically speak in terms of authors of books, so to my knowledge the question of coverage of that statute in its application to a non-fiction book has not ever been raised or disposed of in the New York courts; so that apart from the text of the statute, there is no specific guidance that I am aware of on that question.

Those would be the bases for our urging the Court to quash the subpoena: the regulations, more importantly the First Amendment notion that --

THE COURT: Let me get this. The Baker case does not apply until you get right down to the questions themselves. That is not a threshold --

MR. GORA: Well, the Baker case came up in the context of the depositions where questions were asked and were refused to be answered.

THE COURT: But we are in that posture here,

that I think the questions have got to be put, and I am prepared to give overnight consideration to that once we hit such a question, assuming the factual foundation is laid or the claim of the confidential source.

So I don't think Baker applies to quash the subpoena. Tell me more about why the New York State Civil Rights law does.

MR. GORA: That statute, as I understand it, your Honor, provides for in effect an absolute testimonial privilege on behalf of news gatherers.

THE COURT: Does that bind a Federal Court?

MR. GORA: There are cases, and in the portion of the memorandum which has not been completed there are cases which I will be happy to provide your Honor, the clerk and counsel, indicating that even in a criminal case in the Federal Courts, State policy are matters of this kind, lawyer-client privilege, journalist's privilege, can be looked to as a source of law.

The reporting for this book went forward almost exclusively in the State of New York, so that the statute would attach to the reporting; and as I said, I believe there are some cases which indicate that either in civil or criminal cases, the Federal Court is empowered to look to strong public policy of the State in formulating a ruling

on an evidentiary matter like this. It's really a substantive matter.

THE COURT: You are saying it has weight with me, but what I am asking you is, am I bound by it?

MR. GORA: I don't know the answer to that, your Honor. I have not had a chance --

THE COURT: Because I am troubled by the fact that if I were sitting in New Jersey, could you urge upon me that because the book was written in New York, I must apply the New York Civil Rights law although I am a Federal Court in New Jersey?

Those are wrinkles in this matter that --

MR. GORA: I don't think that those wrinkles are necessarily -- well, in the Baker case there was no indication where the story was written. It was about events that occurred in Chicago, and it was written before the New York statute came into effect, but the order to answer questions or the request for information came after the New York statute, and the deposition was here, and Judge Kaufman made it quite clear. I don't recall whether he said that a Federal judge would be bound by the New York statute, but he did indicate in strong terms that New York statute was a very strong public policy of the State of New York to be looked to in a case of this kind.

THE COURT: In any event then, both of those matters, I believe, become justiciable at such time as the question is put, "Did you talk to so-and-so, and what did he say," so I don't think that either of those apply at this point.

MR. GORA: What would be your Honor's intention with regard to proceeding with this matter?

THE COURT: I think we should start.

If there is no objection, I think we ought to start with this witness and get to such point as you feel that the authorities make the issue before us.

Mr. Sherr, any objection to doing that?

MR. SHERR: No, I have no objection.

THE COURT: All right.

MR. GORA: Your Honor, just in terms of the orderliness of the procedure, would I be afforded an opportunity to object on behalf of the witness?

THE COURT: Absolutely.

MR. GORA: Fine. Might I also just have a very brief one or two-minute conference with her?

THE COURT: You may.

MR. GORA: Thank you, your Honor.

(Recess.)

THE COURT: Mr. Padgett, are you prepared to

proceed?

MR. PADGETT: Yes, I am, sir.

THE COURT: With this proceeding on the theory that all matters are open to you until otherwise ruled on?

MR. PADGETT: Yes, sir.

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S U S A N H A L L , called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PADGETT:

Q Miss Hall, I show you Government's Exhibit 25 for identification.

THE COURT: Let's establish her background here.

MR. PADGETT: That is precisely what I am afraid of, your Honor. I don't want to delve too far into the background.

THE COURT: Miss Hall, where do you live?

THE WITNESS: 25 West 77th Street.

THE COURT: How long have you lived there?

THE WITNESS: Six years about, I think.

THE COURT: Are you in the field of writing?

THE WITNESS: Yes.

THE COURT: Go ahead, sir.

Q Miss Hall, I show you Exhibit 25 for identification.

Do you recognize it?

A Yes.

Q What do you recognize it to be?

A It's a book that I am the author of.

Q Will you tell us when this book was published?

A In the spring of 1973, not that version of it, but another.

Q Your first version was a hard bound edition, is that correct?

A Yes, sir.

Q Did you have occasion to read both the hard and the soft bound?

A I don't believe I ever read the soft bound edition.

Q You are, of course, familiar with the hard bount one?

A Yes, sir.

Q Would you briefly examine Exhibit 25 for identification and tell us briefly whether that is the same book as was published in the hard bound edition?

MR. SHERR: I have to object to that. The

witness certainly can't briefly examine 200 pages word by word.

THE COURT: Let's go at it another way.

Between the hard cover and soft cover, were there any changes made editorially?

THE WITNESS: Not with my approval, but I know some changes were made, yes.

THE COURT: All right.

We will get to such changes as may be relevant to this case as we get to them.

Go ahead, overruled.

MR. SHERR: Excuse me, your Honor, we don't know what changes were made, so we don't know whether they were relevant or not relevant.

THE COURT: We will find out.

MR. SHERR: We have no way of finding out which were changes and which weren't changes.

THE COURT: We will find out if, as, and when we get to such place in the course of the examination.

I take it there is going to come a time when, let us assume for argument's sake that we were to get to the issue of specific language and specific text.

MR. GORA: Your Honor, if I might -- forgive me, your Honor -- on that question, my understanding is

that there is no intention on the part of the Government to direct questions concerning the content of the book. Mr. Padgett and I discussed that. That was my understanding. I don't know what the situation now is, and maybe we are not heading towards questions about the content.

THE COURT: Perhaps. I am puzzled by this.

MR. SHERR: Maybe I misunderstood too. If that is your intention --

THE COURT: Mr. Padgett, why don't you take it? I will overrule that objection. Why don't you go forward and we will see where we get to.

MR. PADGETT: I forgot my last question.

THE COURT: You asked her whether there were changes.

Q Miss Hall, you said there were some changes; is that right?

THE COURT: And she said yes, but not with her approval, right?

Q You identified Government's Exhibit 25 as a book of which you were the author; is that correct?

A Yes.

THE COURT: She did.

Q Did Robert Edelman assist you?

A Yes.

Q Can you tell us what function he performed?

A He was a photographer.

Q In connection with this book, did you pay a sum of money to anyone?

MR. GORA: Your Honor, on behalf of Miss Hall, I object to a line of questioning about arrangements or relationships that she may have had with people who may or may not have been sources or subjects of this book. Frankly, I am going to, if it suits your Honor's pleasure, I'd like to state our position at this point, because I think I have a sense of what lines of questioning we are talking about.

As to questions about financial arrangements covering information which Miss Hall earlier provided to the Internal Revenue, our view is that, notwithstanding her provision of such information, First Amendment and the other sources that we have cited make it requisite that there be no other source for the evidence that the Government seeks to introduce, and that her testimony be compelled only as a last resort.

Our second set of objections will be to any line of questioning which has the effect or the tendency of identifying any individual or individuals who may have

been the confidential sources of materials that Miss Hall gathered for the book.

As to those lines of questioning, as to questioning into confidential sources or information that would help to identify confidential sources, our position is that under the balancing test in Baker, as well as the other cases that we have cited in our memorandum, there are two recent State Court decisions as well, she cannot be compelled to answer questions that implicate source identities.

THE COURT: Let's take this. You are going into broad areas. Let's take this one question at a time. I will sustain your objection to the question as it is put because it calls for all possible people with whom there were financial arrangements at this point.

Mr. Padgett, do you want to break that down in any way?

MR. PADGETT: I personally do, your Honor, but I think by taking this broad-brush approach to it, we can come to a series of questions which apparently are particularly objectionable to the witness. I think the question as I put it to the witness, although concededly it may be braod, is in itself innocuous and may be answered without the assertion of any privilege, real or imagined.

THE COURT: I frankly would have thought so myself but --

MR. GORA: Your Honor, I am afraid I am just being overly cautious to protect her rights. I am concerned that series of questions be put, and if there be no answer, or if there be a refusal to answer on the ground of privilege, that your Honor would not rule on that until tomorrow morning.

THE COURT: I will not. There is no question about it. I have got to find an area upon which you wish to assert this privilege to give proper consideration to it.

MR. GORA: That is why I objected at the point that I did.

MR. PADGETT: Your Honor, assuming an assertion of privilege is made, and assuming that it is based on counsel's second point that we are delving into an area where the source information or informant information must be revealed by the witness, my question is so broad, your Honor, that it does not narrow onto that, so I feel that at this point it actually protects the witness and yet allows the Government to obtain some information from the witness without injuring her privileges, such as they may be.

Certainly she must have paid money to someone in

connection with this book.

THE COURT: I will allow it.

MR. PADGETT: Thank you.

Q Did you pay, in connection with this book, money to someone?

A Yes.

Q Were you present when Bob Edelman paid a sum of money to someone in connection with this book?

MR. SHERR: I have to object to that. Whether she was present with third parties doesn't affect this defendant.

THE COURT: No, I will allow it.

MR. SHERR: Respectfully except.

A I am very reluctant to answer the question because of its breadth. I really can't recall.

Q Did you ever make any payments to any corporations in connection with this book?

A Yes.

MR. SHERR: The same objection, if it please your Honor.

THE COURT: I will allow it.

MR. SHERR: Respectfully except.

Q With respect to the payment made to a corporation, can you tell us the name of the corporation to which

a payment was made?

A Porcupine Productions.

Q Can you tell us when that payment was made?

MR. SHERR: If your Honor please, I have to renew my objection to this line of questioning. Porcupine is not a defendant, named defendant in this indictment. There is no conspiracy charge.

THE COURT: I will allow it.

MR. SHERR: Respectfully except.

THE WITNESS: Pardon me, Mr. Padgett?

Q Can you tell us when you the payment to Porcupine?

A I believe in July or August of 1972.

MR. SHERR: I couldn't hear the answer.

THE COURT: July or August of 1972.

Q Did you make that payment by cash or by check?

MR. SHERR: I must renew my objection, your Honor. These are payments in July and August 1972. There has been a whole series of testimony about payments made in July and August of '72. This indictment refers to 1971. There has been no connection whatsoever with this testimony about payments made in the latter part of '72 with any of the charges in the indictment.

THE COURT: I will allow it.

MR. SHERR: Respectfully except.

MR. PADGETT: May my question be read back, please?

(The last question was read.)

A I made a payment by cash -- by check and also some cash.

Q Were both of those payments made at the same time?

A No.

Q Addressing yourself to the payment made by check to Porcupine Productions, do you remember for how much that check was?

MR. SHERR: May I have a continuing objection, your Honor, with reference to all questions concerning these payments in July or August of 1972 to Porcupine?

THE COURT: Yes, you may.

MR. SHERR: Thank you.

A $1000.

Q With respect to the cash payments to Porcupine Productions, how much was that?

A $2000.

Q When was that payment made?

MR. GORA: Your Honor, a response to that gets into the area of confidential source information, so far as I understand it.

MR. PADGETT: Your Honor, I submit we are now talking about a payment to a corporation, not to an individual, unless counsel is suggesting that a corporation was the witness' source.

MR. GORA: I am not suggesting who was the witness' source. I am just making an objection on First Amendment grounds to a response to that question.

THE COURT: I would be inclined to overrule the objection to that because I don't feel you have reached your position.

MR. GORA: Is it possible for my client to respectfully refuse to answer that question now, pending your Honor's ruling?

THE COURT: I don't want to put you in that position in a United States Court, given the fact that you want to raise a legal objection.

MR. GORA: I am sorry, I didn't understand your Honor.

THE COURT: I say I don't want to put you in the position of directing the witness not to answer --

MR. GORA: That was not my intention.

THE COURT: -- a question in the United States Court where the idea is to raise a legal issue for consideration, and then upon mature consideration between now

and tomorrow, we will rule on it with some thought and knowledge.

Your position is that for her to say when she made a cash payment to Porcupine Productions is a step in the direction of revealing a source.

All right.

MR. GORA: Yes.

THE COURT: Could you go on to another subject? I will reserve decision on your Objection.

MR. GORA: Thank you, your Honor.

THE COURT: Mr. Padgett, it might well be that the best way to handle this is for you to make an offer of everything that you think you could get from this witness were you to be permitted inquiry without objection, and then I can take those up. I can deal with it as an offer of proof, because otherwise I fear we are going to be here quire some time as we get close to what may be -- I don't regard, frankly, the last question as being within the area of argument. I am dealing with it that way because I don't want to foreclose anybody but --

MR. PADGETT: The difficulty here, your Honor, is that, as counsel, Mr. Gora, has alluded, there is a certain affidavit made by the witness. That I am afraid is the totality of my knowledge as to what her answer to

my knowledge as to what her answer to my question will be, and although I have, as counsel has stated, alluded in some detail to the questions I intend to pose to the witness in a number of conversations between myself and Mr. Gora, I really don't know what her answers are going to be.

I can point out to the Court the substance of the affidavit.

THE COURT: Let me ask you this. You are inquiring in effect in fresh ground for yourself.

MR PADGETT: Yes, sir.

THE COURT: Would you be inquiring in the normal course as to conversations that you would like to explore, if she had any conversations with the defendant, what did they say? Is that one area of inquiry?

MR. PADGETT: Yes, your Honor, it is conceivable that there may well come a time when a question would be posed to this witness which would ask her to reveal whether or not she had a conversation with the defendant, and whether or not the defendant told her something. However, I can represent to the Court that that conversation would not have taken place prior to -- would not have taken place in connection with the input of any material to the journalist. It would rather be directed towards the

business or the -- I shouldn't say the business -- the financial arrangements which existed between the witness and the defendant, if indeed they did exist. The Government does not intend to ask this witness what the sources for her book were, nor indeed any of the conversations which led up to the revelations contained in her book, nor indeed who gave her that information. That is not of the slightest moment to us.

THE COURT: What is of moment to you? Maybe the issue is going to be much more limited than anybody expects.

MR. PADGETT: Of interest to the Government is strictly what if any moneys this witness paid the defendant, when those moneys were paid, and whether or not they were paid to the defendant or to someone acting or something acting on his behalf.

THE COURT: Does that put a different picture on your --

MR. GORA: No, your Honor, because the benefit of my conversations with Mr. Padgett earlier before today led me to the same result. The problem is that answering questions about whether or not the defendant or anyone else is the source or subject of the book is what gets into confidential information.

Mr. Padgett is illuminated to the extent that he has whatever information Miss Hall gave the IRS some time ago. So that information, our position is that the First Amendment requires it be obtained from some other source but that, as I recall, that information does not include the identity of any individual.

THE COURT: Mr. Padgett, is it your intention to tie the payments in with this book, Exhibit 25 for identification? Are you going to ask me to draw the conclusion in any way that Mr. Mitchell is the subject matter of this book?

MR. PADGETT: Yes, I will, but not necessarily through this witness' testimony.

THE COURT: Are you at some point going to offer the book in evidence?

MR. PADGETT: Yes, I am, or at least portions of the book.

THE COURT: You say you do not intend, and are now dealing only with the very limited issue of, shall I call it, journalistic privilege here? You do not -- just to see what our homework has got to be tonight -- you do not intend to have this witness say that Mr. Mitchell is the actor in the book, Exhibit 25 for identification?

MR. PADGETT: No, your Honor, I intend to attempt

to elicit from this witness testimony that she paid to Mr. Mitchell, the defendant, sums of money during 1971 and 1972, and that in 1972 these moneys were paid to a corporation known as Porcupine Productions, were receipted for by Porcupine Productions, when indeed the moneys had been paid to Mr. Mitchell in person; that these moneys were paid by cash, and that --

THE COURT: I don't see that that gets you any journalistic problem. I am trying to see where the journalistic problem arises.

MR. PADGETT: Well, your Honor, quite frankly I don't see the privilege either. I have discussed this with counsel, and his position that there is a problem involved. I have tried to make my questions as broad as possible to elicit that financial information and not to trespass on any, as I say, real or imagined privilege; so it's just that we can void this issue, which I feel is totally ancillary to this proceeding.

THE COURT: Mr. Gora, it seems to me that if all the Government is going to ask of this witness is did you pay Mr. Mitchell some money, period, I don't see that that gets you even within the arena of journalistic privilege of any kind.

MR. GORA: Well, your Honor --

THE COURT: Even assuming one applies to the author of a book.

MR. GORA: If the witness has previously provided information that payments were made in connection with the book, and the Government is now asking her to identify to whom those payments were made, whoever that person may be, in my mind, your Honor, that is in effect making the journalist identify the source in a way that the journalist has never before, notwithstanding a certain reluctant co-operation a year or so ago with the Government, provided informatic

MR. PADGETT: Indeed not, your Honor. The "in connection" phrase could mean that Mr. Mitchell, who presumably would be identified by the defendant, bound the book or supplied the paper, not necessarily that he supplied the information in connection with the book.

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THE COURT: Let me ask you this, Mr. Gora:

In connection with this affidavit of Susan Hall which I have here, and which I ask be marked as a Court's exhibit at this point for identification, do you regard whatever is stated in there as a waiver of any privilege?

MR. GORA: No, no, I don't, your Honor. That affidavit was submitted in support of this motion to describe the journalistic tools that Miss Hall had to use.

(Court Exhibit 1 marked.)

THE COURT: I thought this was the affidavit to the IRS.

MR. GORA: No, I am sorry, it is not. On the affidavit to IRS, that happened quite some time ago. I was not representing Miss Hall at all at that time.

THE COURT: Mark that as a Government exhibit for identification, if you will.

(Government's Exhibit 26 was marked for identification.)

THE COURT: That is the affidavit to IRS. You have seen it, I take it?

MR. GORA: Yes, I have your Honor.

THE COURT: Do you regard that as a waiver of anything that is contained in there?

MR. GORA: It is a waiver presumably of confidentiality. I am not sure that it's a waiver of our claim that even as to information already provided, before you can make a journalist sit up on the witness stand and talk about anything, you have to show you can't get it somewhere else, and I don't believe that that information is a waiver.

THE COURT: I do not see that the Government is far from the target on the not being able to get it from

anybody else In this case.

MR. GORA: I am not in a position to comment on that, your Honor.

THE COURT: You are asking the person who made a payment to another person, and there are only two of them, so that they may well have, even assuming that argument is a valid argument, I take it you are now back under the Code of the Federal Regulations that we referred to earlier.

MR. GORA: Also under the First Amendment under terms of other alternatives. I am not familiar enough with this case to know whether or not the Government can get that information elsewhere, but we would say as a very bottom line, even if your Honor directs Miss Hall to answer questions covering information provided earlier, nevertheless she cannot be made to answer questions concerning the identity of individuals who may have been sources for her book, and if you study that affidavit, except for the use of some form of pseudonym, there is no such information of that kind.

MR. PADGETT: Your Honor, I think it could be safely said if there were some other way the Government could extract this information, we wouldn;t be going through this process, and I wouldn't have been on the phone with

Mr. Gora for the last two weeks.

MR. GORA: I accept that statement in the best of faith, your Honor. I am sure Mr. Padgett is right, but nevertheless, as to bottom-line information about sources, I think our position is that she cannot be made to answer.

THE COURT: The narrow issue then at this point is, you want to ask Miss Hall, "Did you pay Mr. Mitchell certain moneys, and how much, and when?"

MR. PADGETT: Yes, sir.

THE COURT: And that is all?

MR. PADGETT: No, sir, and in addition, did she provide receipts to any other individuals for those moneys, and were those receipts provided for at the direction of Mr. Mitchell, and to whom did she provide those receipts.

THE COURT: Gentlemen, I will recess until 10 o'clock in the morning.

MR. PADGETT: Your Honor, if we could just have a very brief -- I have the hard bound edition, and I would ask Miss Hall to identify this.

Q Do you recognize that book, Miss Hall?

A Yes, Mr. Padgett.

Q Is that the hard bound edition of the book of which you are an author?

A Yes.

MR. PADGETT: May this be received as Government's Exhibit 27.

(Government's Exhibit 27 was marked for identification.)

xx THE COURT: Off the record for a minute.

(Discussion off the record.)

THE COURT: Mr. Gora, you have some citations you want to call to my law clerk's attention?

MR. GORA: The citations are in my memorandum of law. There are some additional ones in points not briefed, and I would like to give them to Mr. Block.

THE COURT: Do you have them available?

MR. GORA: I am giving them to him. One other question.

We indicated when we started out, that we hoped this matter could be resolved without in any way delaying these proceedings, and I apologize for the fact that it couldn't be, but frankly it wasn't our fault.

THE COURT: No problem.

I want to commend everybody for their efforts in this case.

MR. GORA: Thank you, your Honor.

(Adjourned to Friday, July 2, 1974, at 10.00 o'clock a.m.)

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UNITED STATES OF AMERICA

vs. 74 Cr. 265

JAMES MITCHELL.

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New York, July 2, 1974;
10.00 o'clock a.m.

(Trial continued.)

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THE COURT: Mr. Sherr, is your client in the vicinity?

MR. SHERR: I sincerely hope so. I haven't seen him in the courtroom, your Honor, but he is usally tardy in most of our appointments.

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A N N A F R E D E R I K A S A U E R, having been previously sworn, resumed and testified further as follows:

THE COURT: You remain sworn.

THE WITNESS: I am still sworn?

THE COURT: Yes.

Mr. Sherr, you may be seated while we wait for your client.

Mr. Padgett, while we are waiting, are there

any exhibits you want to pre-mark to make use of the time?

MR. PADGETT: No further exhibits, your Honor. There may be some 3500 material which would become important. I will have the agent begin to proceed to mark those. We have some slips.

Your Honor, I would like to make one statement to the Court. Despite the fact the defendant is not present, I think it's just an administrative matter.

I have at this time the witness' yellow sheet or her arrest record, which bears upon her Canadian arrests. I am prepared to submit to defense counsel for the purposes of cross-examination her arrest record here in New York City, but it's on the way over right now from Police Headquarters. We had some trouble reproducing it this morning. I anticipate it being here very shortly.

However, I can reveal on the record to counsel the substance of the arrest record, and I am prepared --

THE COURT: Why don't you wait till it arrives. I take it it's going to arrive in the next two or three minutes.

MR. PADGETT: I am so informed, your Honor, but sometimes the distance between this court and Police Headquarters grows longer and longer.

THE COURT: Why don't you mark it as a 3500

exhibit.

(Government's Exhibit 3505 was marked for identification.)

MR. PADGETT: Your Honor, at this time we neglected to mark as 3500 material the grand jury testimony of this witness which was made available to counsel yesterday. May we mark as 3500 material the testimony of this witness before the August 3, 1973 special grand jury consisting of pages 1 through 72.

THE COURT: Mr. Scherr, this was furnished to you last evening?

MR. SCHERR: Yes, your Honor.

(Government's Exhibit 3506 was marked for identification.)

MR. PADGETT: And as 3507, the testimony of this witness on June 25 before the same special grand jury consisting of pages * through 11-A.

(Government's Exhibit 3507 was marked for identification.)

THE COURT: We will take a recess.

Mr. Sherr, the minute your client arrives, will you and Mr. Padgett and the reporter come to the robing room?

MR. SHERR: Yes, sir.

(Recess.)

(In the robing room, all counsel and defendant present.)

THE COURT: Mr. Mitchell, it is almost 1020.

THE DEFENDANT: Yes, your Honor, I apologize.

THE COURT: Tell me what happened. This was called for 10 o'clock.

THE DEFENDANT: Just traffic.

THE COURT: I suggest that next time --

THE DEFENDANT: It won't happen again.

THE COURT: -- you leave earlier, because I will have to consider what steps I will take if this happens with any frequency. I just want to advise you of that and to adjure you to take all steps to see to it that you do get here on time, because we have witnesses ready and lawyers ready, and we have been waiting for you since 10 o'clock.

Let's go on with the trial.

(In open court.)

THE COURT: Mr. Sherr, you may proceed.

MR. SHERR: Before I start, since the New York City Police record isn't here, I wonder if Mr. Padgett might fill me in briefly.

THE COURT: Either that, or you will have time

to examine it at that point, unless you want to use it in this order, and then I will give you consideration.

Do you want to fill him in verbally?

MR. PADGETT: Yes, your Honor, I am informed -- indeed, I am informed by the witness -- that her arrest record in New York consists of four arrests by local authorities under the name of Ridgeway. Each of those arrests was in 1971. The charges were prostitution, and in each case she paid a fine.

MR. SHERR: Do you know the dates, the months?

MR. PADGETT: I don't. The witness may be able to fill you in on that, sir. I assume it was some time after May of '71 though.

CROSS EXAMINATION

BY MR. SHERR:

Q Miss Sauer, do you drive an automobile?

A No, I don't.

Q Do you have a driver's license?

A No, I don't.

Q Do you have any identification?

A Yes, I do.

Q With you?

A Not with me.

Q Do you have a Social Security card in the United

States?

A Not with me, no.

Q You don't carry any identification with you?

A No, I don't have any on me at this moment.

Q Is there any reason why you don't carry any?

MR. PADGETT: Objection.

THE COURT: I will allow it.

A No, no reason.

Q You stated on direct testimony that you are a citizen of Canada?

A I am.

Q Have you been back to Canada at all since you came to this country?

A Yes, I have.

Q In 1971?

A Yes, I have.

Q On how many occasions?

A Five, six times.

Q How long did you remain each time?

A Pardon?

Q How long did you remain?

A A few days to a week. It depended.

Q You are now living in New York?

A I am living in Canada. I am visiting New York.

Q Pardon me?

A I am visiting New York. I am down here right now because of the trial.

Q You are living in Canada and you are visiting?

A That is my home, Canada.

Q But you have been in Canada in the last three years, you have been there three or four occasions for three or four days?

A No, I didn't say that. I have been there about six or seven times for a period of a few days to a few weeks.

Q So the last three and a half years you have been in Canada, would you say a total of a month?

A More.

Q Two months?

A I am sorry, a month.

Q A month?

A Yes.

Q And for the rest of the time you have been in New York?

A Yes.

Q And you still say you are not living in New York?

A My home is in Canada.

MR. PADGETT: Objection.

THE COURT: I will sustain the objection to that.

Q Where do you live in New York?

MR. PADGETT: Objection to that.

A Where am I staying?

MR. PADGETT: Objection.

THE COURT: What is the basis for the objection?

MR. PADGETT: Your Honor, as I pointed out at a side bar conference yesterday, there is some question as to contact here. Unless there is a pressing reason for it which might be explained at a side-bar conference --

THE COURT: Come up to the side bar, Mr. Sherr, and we will explore this.

(At the side bar.)

THE COURT: Mr. Sherr, if this is to be used in an affirmative way to try to demonstrate something relevant to your case, I will allow it. If it's just to ascertain the location for no other purpose, I would think Mr. Padgett had a point.

MR. SHERR: The point that I am trying to get at, your Honor, is I feel that she is here illegally, and it affects her credibility in that there may or may not have been threats made against her with reference to her being thrown out of the country, in that she is not -- I want to

establish whether or not she has applied for citizenship. If she is properly in the country, if she is just a visitor and she is here illegally, she has the threat of the Immigration reporting her.

THE COURT: I think those are all valid areas to explore, but I just wonder why you need to fix the precise address where she is presently staying.

MR. SHERR: I want to know who she is with, is she a prostitute now, what kind of business she is carrying on, and I want to find out also about her income, what her sources of income are. I am not looking to possibly --

MR. PADGETT: Those are all perfectly valid lines of inquiry, but I don't see why it has to be shown in which apartment in which apartment building she is living. We conceded that she presently resides somewhere on the upper east side of New York City, and I think to further locate the witness might subject her to some contact by the defendant.

MR. SHERR: I'd have no way of verifying the truth or falsity of what she is saying, if she is living with another woman or another man or something, and I'd like to know if she is listed in the telephone book, if she is living under another name.

THE COURT: I think I will have to allow it.

MR. PADGETT: Would counsel be agreeable to the witness providing that information to him on the record at a side-bar conference out of the defendant's hearing?

MR. SHERR: Sure.

THE COURT: All right.

MR. SHERR: I have no objection to that.

THE COURT: All right, we will do that.

MR. SHERR: I should say, your Honor, that this defendant has no record, he is not --

MR. PADGETT: Your Honor, that is not -- I object to that.

MR. SHERR: I don't think there is any contention that he is -- but if the U. S. Attorney feels more comfortable, I have no objection.

THE COURT: You have agreed that that is all right, so let's go forward on that basis.

MR. SHERR: Yes.

May I explain it to my client?

THE COURT: Yes, you certainly may.

(In open court.)

MR. SHERR: May I, your Honor, have a side-bar conference?

THE COURT: Surely.

(At the side bar.)

MR. SHERR: I am just advised by the defendant that he claims he spent the night with her at 321 East 48th Street a month ago, so if she still lives there, I would ask her if she still lives at that address. If the answer to that is no, then I will excuse him. If the answer to that is that, then he knows where she lives.

MR. PADGETT: I would object to the question, "Do you still live there?" and perhaps the question could be phrased, "Did you ever live there and do you live there now?"

MR. SHERR: All right, if it's other than that, I will excuse him.

THE COURT: By all means.

(In open court.)

BY MR. SHERR:

Q Have you ever lived at 321 East 48th Street in New York City?

A Yes.

Q Do you still live there?

A Yes, I do.

Q Under what name?

A I live under Schaefer.

Q Pardon me?

A Schaefer.

Q Do you have a lease there?

A Yes, I do.

Q Did you sign the lease under the name of Schaefer?

A Yes, I did.

Q When you signed the lease, did you give any references?

A Yes, I did. Of course, you need them to get an apartment in the city.

Q Who did you give as references?

MR. PADGETT: Objection.

THE COURT: Who did you give as referencs?

What is objection to that?

MR. PADGETT: I really don't see the materiality of finding out who this woman --

THE WITNESS: Is that discrimination against me?

THE COURT: No, no. The landlord's agent, I assume --

MR. PADGETT: Yes.

THE COURT: Go ahead.

THE WITNESS: Who did I give? You mean give references to the people I signed the lease for?

Q Yes.

A You want the name of my references?

Q Yes.

THE COURT: No, to whom did you give any references?

MR. PADGETT: I understand the question to be who were the references.

MR. SHERR: The question was who were the references?

THE COURT: What is that relevant to?

MR. SHERR: Trying to establish whether or not she gave this -- this is a question of credibility, whether she gave people who exist or people who are in criminal activity or people who are in Canada, people in the United States, or whether she gave Mr. Mitchell as a reference. I'd like to know myself.

THE WITNESS: I gave a job reference.

Q You gave a job reference?

A Yes.

Q You mean an employer?

A Yes.

Q In the United States or in Canada?

A In the United States.

Q Have you worked in the United States for an employer?

A No, I haven't, but you need a reference.

Q What employer's reference did you give?

A He is a legitimate businessman. I really don't want to say his name if --

Q In other words, in your application for a lease, you told the --

A You have to put down a job reference.

Q You told the landlord that you were working for somebody; is that right?

A Yes.

Q That was a lie?

A Well, I -- yes, I used him as a reference.

Q You stated IN your application --

A I used him as a job reference.

Q You stated in your application that you were employed by his company?

A Yes, I did, as a job reference.

MR. PADGETT: Objection.

THE COURT: We are not getting into any names here. Mr. Sherr is not pressing for any names.

MR. SHERR: I didn't ask for the name.

MR. PADGETT: Your Honor, may I have a side-bar conference very briefly?

MR. SHERR: I will withdraw it.

Q It is sufficient that you lied in your application for the lease, right?

THE COURT: About working?

A I do not work for him. I used him as a job reference.

Q So then you lied in your application for a lease?

A I used him as a job reference.

Q Just answer the question:

Did you lie, or did you not?

A I did not work for him.

Q Then you lied?

A I did not work for him.

Q Did you ever work for him other than in your occupation as a prostitute?

MR. PADGETT: Objection.

Your Honor, the Government will concede that the witness had no legitimate employment in New York City, and if in fact she stated on an apartment application that she did have such employment, such statement was false.

THE COURT: I think she has already said that half a dozentimes. She just doesn't want to accept Mr. Sherr's legal conclusion.

MR. SHERR: She doesn't want to use the word "lie".

Q It was not the truth?

A I did not work for him.

Q Do you have any charge accounts?

A No, I don't.

Q What is your present occupation?

A I am unemployed.

Q How do you live?

A From day to day.

Q Do you practice prostitution?

A Yes.

Q Have you practiced prostitution continuously since you have been in the United States?

A Off and on, yes.

Q How much do you earn?

A Enough.

Q How much is enough?

A Enough for me to live on.

Q How much is that?

A Do I have to answer his question? I mean I find it's --

THE COURT: On what issue does this bear? Does this go to the credibility?

MR. SHERR: If your Honor will give me a chance to develop it, it will go to credibility, and it will go to

certain reasons why this witness may be under pressure to testify the way she did.

THE COURT: All right, I think I see what you are after.

Yes, I think you have to answer that.

THE WITNESS: You mean you want to know how much I make a week?

Q Yes.

A Between $800 and $1000 a week.

Q You work how many nights a week?

THE COURT: Mr. Birnbaum, what was that answer?

THE WITNESS: It depends.

MR. SHERR: Between $800 and $1000 a week.

Q And do you work all year?

A No.

Q How many weeks a year do you work?

A Almost all the weeks in the year.

Q Almost all the weeks?

A Yes.

Q So would it be fair to say --

A Sometimes I take time off. Sometimes I take vacations.

Q Would it be fair to say that through prostitution you earn approximately 40 or 50,000 dollars a year?

A If I work a year, yes.

Q Have you made 40 or 50,000 dollars a year since you have been in New York?

A In one year?

Q Yes.

A I have to count it up. I never really like checked on it.

Q In that vicinity?

A Yes, you could say that.

Q Would that be true for the year 1973?

A Yes. Well, last year I made about 40, 50,000?

Q Yes.

A Well, I have to really check up on that.

Q Would it be in that vicinity?

A Approximately.

Q In 1972 did you make approximately the same thing?

A Yes.

Q And in 1971, from the time you came here, which I believe was in May, did you earn approximately the same thing, $850 or $1000 a week?

A Yes.

Q Which would be for seven months approximately 25, 30,000 dollars -- no, $45,000?

A Right.

Q Did you file a tax return for the year 1972 with the United States Government?

A No, I don't. No, I didn't.

Q Did you file a tax return for the year 1973?

A No, I didn't.

Q Have you been advised by your attorney or by the United States Attorney that you are required by law to file a tax return?

A I am not an American citizen.

Q Have you been advised by your own attorney or by the United States Attorney that you are required to file a tax return?

A Nobody has advised me.

THE COURT: The answer is either yes or no, and I will allow the question.

Go ahead.

A I know that I have to fill out tax returns. Everybody has to do it once a year.

Q Do you know that it's a crime not to file tax returns?

A Yes I do know that.

Q Have you been advised that you can be prosecuted for failure to file a tax return?

A Yes.

Q Have you been advised by Mr. Padgett that you could be prosecuted for --

A No, I know the law.

Q That is not my question, dear.

Have you been advised?

A I can't remember.

Q Is it that you may have been advised by Mr. Padgett that you could be prosecuted for failure to file a tax return?

A I really can't remember talking to him on that subject.

Q Do you remember if it was somebody else from his office who discussed it with you?

A No, because I never talked to anybody else except him.

Q Is your answer that he may have advised you but you don't recall?

MR. PADGETT: Objection. That wasn't the testimony.

THE COURT: No, her answer was she didn't recall discussing that subject with him.

Q Is it that you don't recall?

A Right.

Q Originally, when you were called on to testify

before the grand jury, you refused to testify?

A No.

Q You didn't take the Fifth Amendment originally?

A Oh, the grand jury, I am sorry. I got them mixed up, you know. This is my first time. I am not familiar with this setup.

The grand jury I didn't refuse. I really didn't know what was happening.

Q You took the Fifth Amendment the first time you were called to the grand jury; is that correct?

A Yes.

Q Then you were recalled several months later; is that correct?

A Grand jury, I think I was called a month later.

Q Then when you went back into the grand jury the second time, originally you started to take the Fifth Amendment again?

A Yes,

Q Is that correct, and then do you recall on about five or six occasions when you refused to give answers, Mr. Padgett suggested that you step outside the grand jury room?

MR. PADGETT: Your Honor, will object to the form of these questions. This is not the proper way to address

these questions to a witness.

THE COURT: I will permit it in the circumstances.

Go ahead.

A I don't understand. Some of the -- the familiarities I didn't understand, so he explained to me.

Q Do you remember leaving the grand jury room on five or six occasions during the time?

A Maybe it was about three, four.

Q All right, three, four?

A In the very beginning, the first time, in the beginning.

Q And during those times, was it explained to you, was it ever suggested to you that if you didn't cooperate with the Government, you would go to jail for income tax evasion?

A No.

Q Nobody ever suggested that to you?

A No.

Q Nobody ever asked you if you filed tax returns for the years in question?

A The question I think came up.

Q When did it come up?

A When I was talking to Mr. Padgett.

Q When was this?

A A month ago, two ago.

Q Where dis this conversation take place?

A In his office. He did ask me if I filed income tax with the U. S. Government.

Q And what did you say?

A No.

Q What did he say?

A He didn't say anything. He asked me why.

Q And what did you say?

A I told him I was not an American citizen, that is why I am not filing with the U. S. Government.

Q What did he say?

A He didn't say nothing.

Q Didn't say anything at all?

A No.

Q Was this when you came into his office to discuss your testimony at this trial?

A Yes.

Q While he was discussing your testimony at this trial, he questioned you as to whether or not you had filed tax returns?

A No.

Q Excuse me, I haven't finished the question,

please.

A I am sorry.

Q While you were in his office to discuss the testimony you were going to give at this trial, he discussed with you as to whether or not you had filed tax returns for the years '71, in which you concededly earned about 40 or 50,000 dollars, '72 in which you earned between 80 and a hundred thousand dollars, '73 in which you earned the same amount? Is that so?

MR. PADGETT: Objection as to form.

THE COURT: I sustain the objection on the grounds of form.

Q Was it --

A We never discussed. I mean it was --

MR. PADGETT: Your Honor, would you instruct the witness?

THE COURT: You are not to answer. I sustained the objection.

THE WITNESS: Oh, I am sorry.

Q Let me rephrase the question.

A Okay.

Q You came into his office for the purpose of discussing your testimony at this trial?

A Yes.

Q Did you discuss your testimony at this trial?

A Yes.

Q Was it at that time when Mr. Padgett raised the question about your failing to file tax returns?

A It was really -- it wasn't concerning the testimony. It was just --

Q Was it at that time?

A Yes, it was.

Q While he was discussing your testimony at this trial, he also discussed your failure to file tax returns?

A We did not discuss that, no.

MR. PADGETT: Objection.

THE COURT: I will allow it.

A It was just spoken about. It was like something we were talking about income tax evasion, and about people filing income tax, and the question just came up.

Q And it meant nothing?

A It came --

Q It meant nothing to you when Mr. Padgett spoke, asked you that as to whether or not you had filed income tax returns for the years in question?

A Could you say that again?

Q It meant nothing to you?

A No, no.

Q You treated it very lightly, you weren't at all concerned about it?

A No.

Q You didn't feel there was any possibility that you might go to jail?

A Oh, there is a lot of possibility I might go to jail.

Q How did you find that out?

A What, that I might go to jail?

Q Yes. Did Mr. Padgett tell you that?

A No, but I could -- I mean like there is no way of me stopping me from going to jail. I mean I don't understand what you mean. I am not talking about --

THE COURT: Hold on.

Mr. Sherr, could you question from a little bit more in the center of the room, because the back of the witness' head is to me, and sometimes I can't hear an answer, and I am sure it is your desire that I hear answers to your questions.

Q Who was it who told you that you might go to jail?

A Nobody told me I might go to jail.

Q You mean all the times that you came to court, and all the conferences you had with your lawyer, and all

the conferences you had with Mr. Padgett, nobody told you you might go to jail?

A No, not concerning this case.

Q Did they tell you that you might go to jail concerning something else?

A If I get busted, of course, and if I get arrested and charged, I am going to go to jail.

Q Nobody told you you might go to jail for not filing tax returns?

A I could go to jail for that. I mean that is a crime.

26 Q Pardon me?

A That is a crime, if you don't file your taxes, right?

Q Who told you that?

A I know this. It is the law.

Q Pardon me?

A It is the law.

Q Did Mr. Padgett tell you that?

A No, I knew this before, before I even met Mr. Padgett.

Q So when you met with Mr. Padgett to discuss your testimony, you knew that you might go to jail or that you could go to jail for not filing tax returns?

A I could go to jail, yes.

Q And you knew that Mr. Padgett was the United States Attorney?

A Yes.

Q And you knew tha-t Mr. Padgett could prefer charges against you for not filing tax returns?

MR. PADGETT: Objection.

A I don't think so because I am not an American citizen.

THE COURT: I will allow it.

A So I never worried about that.

MR. PADGETT: I am sorry, your Honor, I didn't hear the witness' answer.

MR. SHERR: She said, "I didn't think so because I am not an American citizen, I never worry about that."

THE WITNESS: Isn't that true, if you are not an American citizen you don't file U. S. Government income tax? Is that true or is that not true?

Q That is not true.

A What? What isn't true? That I have to file it or I don't have to file it?

THE COURT: Miss Sauer, unfortunately we are not here conducting a seminar on American tax law.

THE WITNESS: I just want to understand what,

you know, something I --

THE COURT: Let your understanding --

THE WITNESS: Because I am getting kind of misunderstanding in my --

Q Didn't you just say, Miss Sauer, that you knew you could go to jail for not filing an income tax return?

A Well, people do go to jail for not filing income tax, yes. I am just referring to me like more of a general, because -- what happened to me --

Q You never felt that your occupation --

THE COURT: Mr. Padgett, would you mark that as an exhibit. I take it this is the yellow sheet. Would you mark that as an exhibit?

MR. PADGETT: That is the arrest record of this witness here in the United States.

(Government's Exhibit 3508 was marked for identification.)

xx THE COUTT: Let the record show it has been furnished to counsel.

MR. PADGETT: Yes.

Q Getting back to your grand jury testimony, when you said you were taken outside three or four times when you refused to answer, then there came a time when you started answering the questions; is that correct?

A I was telling the truth.

Q Pardon me?

A Yes.

Q During those times that you had those conferences outside in the hall, was it suggested to you that if you didn't cooperate with the Government, you could go to jail?

A No, it was never suggested to me.

Q Was it ever suggested to you that if you did cooperate with the Government, that you wouldn't go to jail?

A No, that was never suggested either.

Q But suddenly you changed your mind and decided to cooperate with the Government?

A I was subpoenaed.

MR. PADGETT: Objection to the form.

THE COURT: I will allow it.

A I was subpoenaed to appear at the grand jury. That's why I went.

Q But you were subpoenaed the first time also in June and you didn't testify.

A Are you sure about that?

Q The exact --

A In June?

Q The exact date was June 25, 1973. Your name is,

you used the name Nancy Pape at that time?

A Yes.

Q Is that one of your names? You have lots of names, don't you?

A Yes, I do.

Q How many names do you use or have you used?

A I really can't --

Q More than 15 or 20?

A No.

Q More than 10?

A No.

Q More than five?

A About five.

Q What are those names?

A My apartment is under Schaefer now. That's the name.

Q I can't hear you.

A My apartment is under Schaefer.

Q Yes?

A That is the name I use.

Q What other names have you used?

A That I have used?

Q Yes.

A In New York?

Q Anywhere.

A Ridgeway and Paper.

Q Pape?

A And Taylor.

Q Taylor when?

A When I was up in Canada, yes.

Q And Sauer, or you don't use Sauer?

A That's my real name.

Q You didn't use your real name?

A Yes, sometimes I do use my real name.

Q Where did you use these names?

A What names?

Q Ridgeway and Pape and all those other names?

A Where did I use them?

Q Yes.

A In the end of my first name, after that.

Q Pardon me?

A After my name, you know, Nancy.

Q Miss Sauer, I meant the location where you used the name, not the position.

A You mean when and where did I use my names?

Q Yes.

A Well, I got busted about three years ago, and I used the name Ridgeway.

Q When you got busted?

A And I used that name. I gave the police officers the name Ridgeway.

Q When you got busted you used different names; is that correct?

A I used Ridgeway when I got busted in New York.

Q What names did you use when you got busted in Canada?

A Taylor, but they found out my real name, so it didn't matter.

Q You don't have any moral qualms about using different names or lying if the occasion --

MR. PADGETT: Objection.

THE COURT: I sustain it.

Q Do you have any moral qualms about using different names?

A No.

Q Do you feel it's wrong to lie?

A I don't lie.

Q You don't lie?

I think it's wrong to lie, yes. It is very wrong. It is very wrong to lie.

Q And you never lie?

A Oh, yes, of course I do.

Q Frequently?

A I mean everybody lies.

Q How about you, frequently?

A No, very rarely.

Q Only when the occasion requires it?

A No.

Q When do you lie?

A Let me see, when do I lie? I have to think about that.

When do I lie?

Q You lied to the police whenever you were arrested, correct?

MR. PADGETT: Objection.

Q With reference to your name?

A No, I didn't lie to the police.

Q With reference to your name?

A They asked me for a name. I gave them a name.

Q Nancy, if your name is Sauer and you tell them your name is Pape, that is not the truth.

A Is that a crime?

Q That is not the truth, is it?

A No, because Pape isn't my real last name.

Q You don't like the word "lie"?

A Pape isn't my real last name: I used that name,

but it's not my real last name.

Q Did you ever have any charge accounts anywhere?

A No, I never did.

Q Any checking accounts?

A Yes.

Q Where?

A In a bank.

Q Where?

A In the city.

Q Where?

A Would you like to know the name of the bank?

Q Yes.

A Manufacturers Hanover.

Q Under what name?

A Schaefer.

Q You lied to the bank about the name, didn't you?

A About what name? About the name?

Q About your real name.

A Well, that's not my real name, no.

Q You told the bank your name is Nancy Schaefer?

A Yes.

Q Your name is Nancy Sauer?

A Yes.

Q Therefore what you told the bank was not exactly

the truth, if you don't want to call it a lie?

A Well, that is not my real name.

27 Q What address did you give the bank?

A Well, at that time I wasn't living on 48th Street. I was living on 81st Street, and I was staying with my girl friend when I got my account, because I was in the middle of moving.

Q Did you give references to the bank?

A Yes, I did.

Q And did you give references of places of employment?

A Yes, I did.

Q Were you working at that place of employment?

A No.

Q So you lied to the bank about the fact that you were working for the --

A I needed a job reference to get a bank account.

Q I understand why you did it, dear. I am just trying to establish that you did lie to the bank about where you were working when you in fact weren't working there.

A I had to put down a job reference.

Q You had to put one down, so you lied about it=

A I didn't work there, no, but I did get the account.

Q You did get the account?

A Yes.

Q By the way, are any of these places where you listed as places of employment, did any of them have yoy on their books?

A Pardon?

Q Any of these places that you listed as places of employment?

A I listed one place of employment, not places.

Q Did they carry you on the books?

A Pardon me? Did I what?

Q Did he carry you on his books as an employee?

A I don't know. I never -- I really don't know.

Q Did you receive any moneys, salaries from this place of employment?

MR. PADGETT: Your Honor, could we have a short conference? I don't want to continuously object to this line. If I could explain it at the side bar, it would be neneficial.

(At the side bar.)

MR. PADGETT: Your Honor, I think we are going to run into a line of difficulty on this type of questions. The witness has informed me that the individual whom she placed as a reference in whatever applications is now a

legitimate businessman, and she will not under any circumstances reveal his name.

I have informed the witness that should we come to a point where his identity or his name will be revealed, or such background which will tend to reveal his identity, I will inform the Court that the man is apparently a legitimate businessman now with no criminal connections.

The witness has further informed me that if directed by the Court, she will respond and reveal this man's name, but she has asked me to make this statement to the Court.

I can say that I have corroborated this, and there can be no connection.

MR. SHERR: Mr. Padgett, I am not particularly interested in besmirching anybody's character. What I am trying to find out, if he had her on the books, if there were any W-2's, if she got any statements.

THE COURT: All right.

I take it you do not want to go as far as that.

MR. SHERR: I am not interested in that.

THE COURT: All right, then just ask if there were W-2's.

(In open court.)

BY MR. SHERR:

Q I believe the last question was, did this place of employment that you listed as a reference carry you on their books as an employee?

A I'm not sure, but I don't think so, but I'm not sure about that.

Q Did you ever receive a form from them listing you as an employee?

A No, I never did.

Q Do you know what a W-2 is?

A No, I don't.

What is it?

Q It is a printed form for an employee listing the name of the employee and the wages earned.

A I never received anything like that.

Q Did you ever receive a form called a 1099, another printed form, from this employer?

A No, I never did.

Q You were first arrested in Toronto some time in 1970; is that correct?

A I think so.

Q Pardon me?

A Yes.

Q Was that for maintaining a bawdy house?

A Pardon?

Q Was that for maintaining a bawdy house?

A Yes, that's what the charge is called.

Q Does that mean you were charged with being the madam?

A No, I was charged because I was seeing men in my apartment, and that is called --

Q I can't hear you.

A Seeing men in my apartment, and in Canada that is called maintaining a bawdy house.

Q Did you have any girls working for you?

A No.

Q Were you the only girl in the apartment?

A At that time, let me think -- no, my sister was with me. I think if there is two girls in the apartment, it's supposed to be a bawdy house.

Q How long had you been practicing prostitution before you were arrested in July of 1970?

A I just started.

Q You just started?

A Yes, I think it was like my first week. I was very unlucky.

Q Did you go to trial?

A Yes.

Q And you were found guilty?

A Yes, I was.

Q Were you guilty?

A Of maintaining a bawdy house? Yes.

Q When you took the stand, you took the stand in Toronto, did you not?

A No, I didn't.

Q You went to trial?

A I don't remember taking the stand. You mean a stand like this?

Q Did you testify?

A This is the first time I ever been in stand like this.

Q When you said you went to trial in Toronto --

A Trial, like there it's -- you said -- the judge -- I don't know. You stand, like I think, over, like you know, where Mr. Mitchell is standing. You don't sit in a little area like this.

Q The layout is different?

A I just stood in front of the judge, if I can recall.

Q Are you sworn in?

A No, no.

Q Did you plead guilty?

MR. PADGETT: Objection, your Honor.

Q Or not guilty?

MR. PADGETT: Objection.

THE COURT: On what ground?

MR. PADGETT: Well, your Honor, I think this question is designed to elicit whether or not the witness when arrested pleaded not guilty. That is a legal statement. That is not a statement of fact. If every individual who pleaded not guilty was indeed not guilty and swore to that, there might be some basis for a line of questioning that I am sure will follow, but it's a legal fact and is not necessarily a fact as such, and I object to that line. That is an objection line of questioning.

THE COURT: I think we are all sophisticated enough here to know that you raise a triable issue by a plea of not guilty, which is a plea that is advanced on your behalf as a matter of right.

MR. PADGETT: Your Honor, I am well aware that counsel is that sophisticated, and I am sure the Court is, but the witness is not.

THE COURT: If it comes down to an area where it becomes inappropriate, I will sustain the objection.

MR. PADGETT: Very well, Judge.

THE COURT: At this point I will overrule the

you like to forget.

Q This was your first arrest, was it not?

A Yes.

28 Q You can't remember your first arrest as to whether or not you --

A I remember what happened.

THE COURT: You are only being asked, Miss Sauer, as to whether you testified on this trial or not.

THE WITNESS: You mean like put up my hand, like the same thing I am doing now? I don't think so. This is the second time I have ever been sworn in that I can recall.

Q When was the first time?

A When I got my Canadian citizenship you have to swear allegiance.

Q Other than putting up your hand, do you remember saying anything to the Court at the tome of your first arrest?

A I must have said something, but I can't recall what.

Q Do you remember denying the charges?

A Did I?

THE COURT: Just do you remember?

THE WITNESS: No.

objection.

Go ahead.

Q Did you plead not guilty?

A I really can't remember.

Q Did you testify?

A What do you mean to testify, you mean like what I am doing now?

Q I don't know the procedures in Toronto in court, dear. You seem to be much more familiar than I am.

A Not familiar with the procedures either.

Q Did you tell the Court your version of what took place?

A Pardon?

Q Did a police officer testify to the effect that you had committed prostitution?

A I think so.

Q Then did you tell the Court your side of the story?

A I really can't remember.

Q You don't know whether or not you denied what the police officer said or not?

A I can't remember. I really can't recall. I mean four years ago, you know, some things you know if it's a long period of time, you know, especially things

THE COURT: That is an answer.

THE WITNESS: I could have. I mean it's possible. At that time it was my first bust, and I really didn't know what was happening, and I didn't understand the charge, and if I did plea not guilty like you are insinuating, I guess I probably thought I was not guilty, but now I understand what is --

THE COURT: The question was whether you remember or not.

THE WITNESS: Oh, I am sorry.

Do I remember?

THE COURT: Whether you remember pleading not guilty.

Q Do you remember whether or not you told the Court your version?

A No, I can't remember.

Q Do you remember whether any witnesses were sworn?

A There must have been the people who busted me.

Q Did you have a lawyer?

A I can't remember.

Q Do you know whether any witnesses were called in your behalf?

A The first time, I don't think so.

Q How long did the proceeding take?

A Not long.

Q Two minutes, an hour, three hours?

A I really can't remember, but I think it would take about 15, 20, half an hour.

You mean from the time I came up?

Q From the time you came up, your case started.

A Not long, about 15, 20 minutes, I guess.

Q You can't recall whether or not you said anything at all at that time in your defense?

A No, I really can't recall.

THE COURT: That is the fourth time, Mr. Sherr.

MR. SHERR: I am sorry. I just find it difficult to --

MR. PADGETT: Objection.

THE COURT: Yes, strike it out.

Q You were in fact guilty of the crime as charged?

A I unde4stand that, yes.

Q Do you know what ID 30 days is?

A Pardon?

Q Do you know what your sentence was?

A I think I paid a fine.

Q Do you know what ID 30 days means?

A ID 30 days?

Q Yes.

A No. What does it mean?

Q I don't know, dear. It's on your record.

A Oh, Id 30 days --

Q Were you confined at all?

A Pardon?

Q Were you confined?

A I think the first night, you know, they keep you overnight, and then the next morning --

Q Could it be some kind of probation for 30 days?

A No, you see, you know, when you get arrested they take you to jail, and they keep you overnight. Then you go to trial next day, and if it's a heavy charge, you get bail or you get sentenced, whatever.

Q After your arrest and your conviction, did you continue to practice prostitution?

A Yes, I did.

Q How much were you making in Toronto?

A Not much. I was just starting. I was a beginner.

Q When you got a little more experienced, how much were you making?

A In Canada, I really didn't work that much. I really just worked like, you know, off and on, and I wasn't really that heavily involved in it.

Q How much did you average a week?

A I did it for pocket money. I mean I just did it just like it wasn't like a job. I just did it like --

Q How much did you average a week?

A I really can't remember. Sometimes I wouldn't work all week if I didn't need the money.

Q Would you say that --

A I just did it when I needed money.

Q Your sister was doing it with you?

A She was doing it.

Q Same apartment?

A Yes.

Q Would it be fair to say that you made more or less than $300 a week?

A You could say that, yes.

Q Which one, dear, more or less or around it?

A Approximately.

Q You were making about $300 a week?

A Yes, if I did, yes. If I needed $300, I would make $300.

Q You continued being a prostitute from the time of your arrest, which you say was your beginning, right throu till the time you decided to take this trip to MOntreal in May; is that correct?

A Is that correct.

Q And you were arrested a couple of more times in between?

A Yes, I was.

Q Did business get better as you became more experienced?

A I wasn't really working that much.

Q Would you say that?

A I just worked when I needed money, like three -- I mean I had a few like steady customers that I would see maybe once a week, or if I needed bread, I needed money, I phoned them.

Q So some weeks you would work one or two days, other weeks you would work five?

A A few weeks I would see one o two people.

Q And then the other weeks you might work --

A Maybe I would see three or four. Next week I might not see nobody.

Q Over this period from July 1970 when you were first arrested until the time you went to Montreal in May, would it be fair to say that you averaged about $300 a week over that ten-month period?

A Let me think. About that, maybe less.

Q Pickings in New York were much better, aren't

they?

A $300 up in Canada, like you see, it's cheaper up there, so you really don't need as much. New York is very expensive, you see. That's why I need more money down here.

Q You were arrested in 1970, July 31, for keeping a common bawdy house; is that correct?

THE COURT: Is this the same one?

MR. SHERR: No, the other one was July 6th.

A Yes.

Q This was July 31st.

A Yes.

Q And then again on February 4 of 1971?

A It was approximately those times, yes.

Q During these ten months that you were practicing prostitution, you didn't have any boy friend or anything like that?

A I went out with a few, yes.

29 Q Did you give any of these boy friends any money?

A No.

Q Never gave them any.

Did they give you money?

A No, because it was -- that's not the situation. I mean I don't go with men just -- I mean, you know, like

just for money.

Q You didn't tell the grand jury that you were working as a prostitute for ten months in Canada, did you?

A I don t think -- they probably never asked me.

MR. PADGETT: Objection.

A That's why I didn't tell them. If they asked me, I would have told them.

Q I believe they did ask you, dear, and if I may --

A Are you sure, and I lied?

Q If I may refresh your recollection, Counsel, page 25, line 17, do you recall being asked this question before the grand jury on August 31, 1973:

"Q You didn't have a job for three or four months, correct?

"A Right."

A What period of time are you talking about?

THE COURT: Wait, Miss Sauer, let him finish his whole question.

Q "Q So you were a prostitute for three or four months, correct?

"A Yes."

Do you remember that?

A What period of time are you talking about? What was the questions asked me before? You just took

that out of the blue.

Q Do you remember being asked that question and giving that answer?

MR. PADGETT: Excuse me --

A No, I don't remember being asked that question.

MR. PADGETT: Your Honor, I will object to this. This is one line taken out of a series of questions, and it's out of context, and it was hard for us to find it here at the Government's table.

I object to it, your Honor. It's unfair at this point.

MR. SHERR: Not unfair. It's a question that was asked and --

THE WITNESS: I don't remember being asked that question.

MR. PADGETT: If it's taken out of context, I think it's unfair.

THE COURT: The answer is the witness does not remember giving that answer.

THE WITNESS: I don't remember, no. If I said that answer, I must have said it because it's written down, but I don't remember.

MR. SHERR: Will the Government concede that this question and answer appears in the official transcript

of the grand jury minutes?

MR. PADGETT: The Government will concede there is a number of questions, that question and answer does in fact appear.

MR. SHERR: I am sorry, I didn't hear that.

THE COURT: They furnished you with the transcript, and they stand behind it.

Q In fact, you told the grand jury that you had worked for an insurance company for a year; is that right?

A Approximately that long, yes.

Q And that after that you worked as a cashier for about four or five months?

A I didn't say that because I never worked as a cashier.

Q Excuse me. May I refer you to page 22, line 12. Do you remember being asked these questions and giving these answers:

"Q How were you employed in Toronto?

"A I wasn't at the time.

"Q I am sorry?

"A I wasn't at the time.

"Q When had you been last employed before the trip?

"A A few months before.

"Q Doing what?

"A I was working in a store.

"Q Which store?

"A I can't remember.

"Q What were you doing exactly?

"A I was a cashier."

A Oh, yes.

Q Isn't that surprising? That surprises you?

A I really can't remember saying that.

Q That was false?

A No, that's probably true. I probably did say it.

Q Which is the truth, what you said then or what you are saying now?

MR. PADGETT: Objection.

THE COURT: Yes, I will sustain it as to form.

Q You just testified that you never worked as a cashier.

A You say something --

Q Miss Sauer --

A I am sorry.

Q Just answer the questions.

A Pardon?

Q You just testified in answer to a direct question

from me that you never worked s a cashier. Would you like to change that testimony?

A Before that you said something about a trip? I worked as a cashier before --

Q Miss Sauer --

A I just want to know.

MR. SHERR: I move to strike out the answer as not being responsive.

A I used to work as a cashier and a waitress when I was 15, 16 years old. What period of time are you talking about?

THE COURT: Come on, Miss Sauer, listen to the --

THE WITNESS: I am --

THE COURT: If it is a proper questio, then you have to answer it. If it is not a proper question, then there will be an objection and you don't answer.

THE WITNESS: Okay, I remember.

THE COURT: All right.

Mr. Sherr, go ahead.

Q Do you recall about two minutes ago my asking you if you ever worked as a cashier, and you said no? Do you remember being asked that?

A Not for --

Q Miss Sauer, please just answer the question.

A Okay.

THE COURT: Do you remember being asked that question?

Q Do you remember being asked that question and giving that answer?

A Yes, I do, yes.

Q Do you wish to change that answer at this time?

MR. PADGETT: Your Honor, I will object now unless we can have the precise question read back to the witness.

THE COURT: I think that would probably be of assistance to everybody.

Mr. Birnbaum, can you find that question without too much trouble?

(The question and answer were read.)

Q Do you remember being asked that question and giving that answer?

A A few minutes ago?

Q Yes.

THE COURT: Yes.

A Yes, I did say that, and you said what you said.

Q Was that true?

A I did, when I was younger, when I was about 15, 16 I worked as a waitress, and I did a little bit of cashier-

ing, but that was no full-time job. I can't count that, I mean, as strictly as a job. I mean I didn't work as a cashier, I mean, you know, register, you know, because -- but I never had that as a full-time job.

Q This is, you say, when you were 15?

A I was about 15, 16, because I had an after-school work like, you know, in a little coffee shop.

Q Miss Sauer, isn't it a fact that you told the Government during your examination before the grand jury that you stayed in school till you were 17?

MR. PADGETT: Objection.

A Yes, I was about --

THE COURT: No, I will allow it.

Q And that after you got out of school at the age of 17, you went to work for an insurance company fora year?

A A few months after, yes.

Q And that after that you went to work as a cashier for six months or four months or five months or whatever it was?

THE COURT: Three or four months.

Q Three or four months?

A Did I say that?

Q Yes, dear, you said that.

A Oh, okay.

Q Which is it? Is your testimony that you gave here correct, is the testimony that you gave before the grand jury correct?

A You mean about the cashier, about me working?

Q About the fact that you worked --

A Both testimony.

THE COURT: Let's stay with the cashier.

Q The cashier, the fact that you worked as a cashier when you were approximately 18, about a year after you got out of high school or a year after you left school, that you worked as a cashier for three or four months.

Is your testimony that you gave before the grand jury correct or true?

A About working as a cashier?

Q Yes.

A No, it's not true.

Q Was your testimony that you gave before the grand jury that you only worked as a prostitute in Canada for three or four months true?

A No, it's not true.

Q You realize you were under oath?

A I realize that.

Q Before the grand jury?

A Sir --

Q There came a time when you say you went to Montreal; is that correct?

A That's right.

Q That was some time in May of 1971?

A Yes, it was.

Q You went to visit somebody, and a friend drove you there?

A Yes.

Q And you took, if I recall your testimony, just a few clothes for a couple of days; is that correct?

A I was going to stay for about a week, because I left Thursday night, and I was planning to be back -- I was planning to leave like Wednesday night.

Q And you took clothes for about a week, a couple of days?

A Yes, but every time I travel for a week, I always end up taking more, you know, more clothes than, you know, I always overpack.

Q Did you take clothes for a week, or did you take clothes for six months?

A I took clothes for a week. That's how long I was planning to stay.

Q You said you met Mr. Mitchell in Montreal; is that correct?

A Yes, I did, yes.

Q You met him at some discotheque?

A Yes.

Q You went home, I believe that was on a Friday?

A Let me see, it was on -- no, it was Thursday night, wasn't it?

Q Pardon me?

A Let me think. Friday night, yes, it was Friday night, Friday night.

Q And I believe you testified that when you met him in the discotheque, you left with him and went to his hotel?

A I think so. I think we might have stopped at the restaurant but I --

Q You had something to eat?

A I really can't remember.

Q You had something --

A But we did end up in his hotel room, yes.

Q You spent the night with him?

A Yes.

Q That was the first night?

A Yes.

Q You are sure of that?

A Yes.

Q Then I believe you testified that the following day you lost his telephone number, so you didn't --

A No, I didn't lose it. I forgot it. He told me the phone number, but I forgot what room he was in. I forgot to look on the door, and I didn't know his last name. That's why I didn't call him.

Q So you didn't see him Saturday?

A No, I didn't.

Q You saw him again on Sunday?

A I saw him Sunday afternoon.

Q When you spent the night with Mr. Mitchell,did you charge him?

A Pardon?

Q When you spent the night with Mr. Mitchell, did you charge him?

A Charge him? Whar do you mean charge him?

Q Are you serious? You don't understand the question?

A Charge him, you mean did I ask him for some money? Is that what you mean?

Q Did you ask him for some money for going --

A No, I didn't ask him for no money.

Q So this was not a professional liaison, this was a --

A I wasn't a professional then.

Q You were just a prostitute for ten months, you were an amateur prostitute for ten months?

A Well, that wasn't my job. I mean I didn't think of myself as a professional because I --

Q What was your profession?

A I did it to get some money.

MR. PADGETT: Objection.

THE COURT: I sustain that objection.

Q All right.

When you went to bed with Mr. Mitchell, it was the way an ordinary man and woman go to bed?

A Yes, that's what I am. I am just an ordinary woman.

Q Without any financial consideration; is that correct?

A Not at that moment, no.

Q What do you mean at that moment?

A Tyere was no talk about any money that night. We were talking about --

Q Did you like Mr. Mitchell?

A Pardon?

Q Did you like Mr. Mitchell?

A Yes.

Q Did he like you?

A I hope so. I think so.

Q In fact, did there come a time when he stated to you that he loved you?

A I don't remember.

MR. PADGETT: OBjection.

THE WITNESS: I don't remember.

THE COURT: I will allow it.

A No, because he never did.

Q He never did?

A No.

Q You are certain?

A Well, a woman's intuition tells me this, and I always follow that.

THE COURT: Mr. Sherr, will you be much longer?

MR. SHERR: I am afraid so.

THE COURT: All right, we will take a recess until 11.30.

(Recess.)

MR. SHERR: Could you read the last question and answer, please?

(The last question and answer were read.)

BY MR. SHERR:

Q You are certain about that?

A Pardon?

Q You are certain about that?

A Yes.

Q I refer you to your grand jury testimony given on August 3, 1973, page 55. Actually it starts on page 54, line 22:

"Q What did he say then?

"A He tried to get me to come back.

"Q How did he try?

"A Well, you know, those kind johns, they lay on you, you know.

"Q Tell us.

"A 'You are my baby,' you know. 'I need you. Why don't you come back? I love you.'"

A Who said that, I said that or he said that?

Q You said that he said that.

MR. PADGETT: I object, your Honor. If we continue the sequence of questions here, perhaps we will have a fuller picture of what the whole sequence was.

THE COURT: Is that the end of that question?

MR. PADGETT: It's the end of that question, but not the end of that sequence.

THE COURT: I will permit it.

I will permit you on redirect to add any addi-

tional portions you may feel are necessary for a complete picture.

Go ahead.

Q Do you remember being asked that question and giving that answer?

A Mr. Mitchell tell me that?

Q That he said, "You are my baby, you know, I need you. Why don't you come back? I live you."

THE COURT: Do you remember testifying to that?

THE WITNESS: I don't remember, but if it's written down, I must have said that.

Q I can't hear you.

A I don't remember saying that, but I must have aid it.

Q Was it true?

A What, that he loved me and needed me?

Q That he said, "I need you, I love you."

THE COURT: This is at the time he was trying to get her to come back.

THE WITNESS: Yes, I -- was that true, that I said it? Is it true that I said that he said that?

THE COURT: Yes.

THE WITNESS: Yes. My memory was sharper last year. It's been three years.

Q So that would you like to change the answer you gave me a few minutes ago when you said that he never told you he loved you?

A You know, I really can't remember if he ever told me.

Q Which is it?

THE COURT: I think she has answered.

Q Did you love him?

A No.

Q Did you consider him as a boy friend?

A Not really.

Q You told us before that when you were in Canada you had some boy friends, right?

A Yes, I do have some now too.

Q And you also had customers, regular customers whom you charged?

A Yes.

Q And I assume the boy friend you didn't charge?

A Yes, you could say that.

Q Mr. Mitchell you never charged; is that correct?

A I never got any money from him, no.

Q You never got any money at all from him?

A I got the few dollars.

Q But you never charged him for going to bed with

him?

A No, I never did.

Q And you never charged your other boy friends for going to bed with them?

A No.

Q But you charged your customers for going to bed with them?

A Well, yes, I did charge some men.

Q Would you say that while you were in New York Mr. Mitchell was your boy friend?

A You could say that.

Q When you came to New York, you testified that you boarded the plane separately, and that Mr. Mitchell was on the plane, and that after you got on the plane you sat together?

A Yes, we did.

Q Is that correct?

A Yes.

Q Is that the truth?

A That after we boarded the plane, well, we sat separate, and then when it started, like you know, went up in the air, he came and sat with me. I came and sat with him.

Q You sat together?

A Yes.

Q You told the grand jury several other versions of that trip, didn't you?

A I did?

MR. PADGETT: Objection.

THE COURT: Yes, I will sustain it as to form.

Q Did you tell the grand jury several other versions?

MR. PADGETT: I will object to it as to form.

THE COURT: Objection as to the use of the word version?

MR. PADGETT: Yes, sir.

THE COURT: You may rephrase it without the word version.

Q Let me give you the exact testimony.

I refer to page 20 starting at line 22 and continuing on to page 21. Do you recall being asked these questions before the grand jury on August 3, 1973 and giving these answers:

"Q Did you go back to your home at the end of the weekend?"

And this was referring to the weekend in Montreal.

"A No.

"Q Where did you go?

"A I came to New York.

"Q By yourself?

"A Yes."

Do you remember those questions and answers?

A Well, I did board the plane by myself. I did cross Customs and Immigration by myself. That's what I neant.

Q When you said you came back to New York by yourself, you meant you boarded the plane by yourself?

A Yes.

Q Then do you recall, again on pag 32, line 14, being asked these questions and giving these answers:

"Q When you arrived in New York, was the limousine waiting for you?

"A Yes, because he had called up from the airport, like you could call for a limousine to drive you from the airport home, and this iw what he did.

"Q Who had called?

"A Mr. Mitchell had.

"Q He met you at the airport?

"A No.

"Q How was the limousine?

"A He was down. He came back earlier and I"

A Wait a minute.

Q Do you remember being asked those questions and giving those answers?

A No.

Q Were those answers then correct?

MR. PADGETT: Objection.

THE COURT: If she doesn't remember giving them, I don't know how she can --

MR. SHERR: Will counsel concede that the transcript of the grand jury minutes contains the questions and and answers as I have ready them?

MR. PADGETT: You quoted them correctly, yes, sir.

Q Were those answers correct?

MR. PADGETT: I renew my objection.

THE COURT: Yes, I will sustain it unless she has a memory of giving them.

Q Did he come back earlier?

A No, he came back --

MR. PADGETT: Objection.

THE COURT: I will allow it.

You may answer.

A I can't remember if he boarded the plane first or I did, but we sat separate.

Q Did he come back to New York earlier?

MR. PADGETT: May the witness be allowed to

finish her answer?

A He was on the same flight like I was, so he came back at the same time.

Q So he didn't come back earlier?

A No, he didn't come back earlier. He might have stepped off the plane before me.

Q Any testimony then to the effect that he had come back earlier was incorrect?

MR. PADGETT: Objection.

THE COURT: I will allow it under the circumstances.

You may answer.

THE WITNESS: What was the question?

THE COURT: Let Mr. Birnbaum read the question.

(The last question was read.)

MR. PADGETT: Your Honor, I will have to renew my objection. That question does not necessarily refer to Mr. Mitchell, the defendant, and this witness in the same plane. There is no connection as shown by the testimony itself to that flight.

THE COURT: Let me see the grand jury minutes.

MR. PADGETT: It's page 32 and 33, your Honor.

THE COURT: No, I will allow it.

Overruled.

Q Will you answer the q2uestion, please?

A What was the question?

MR. SHERR: Would you read it back, Mr. Birnbaum?

(The last question was read.)

A That he came back to New York earlier than me? He was on the same flight with me, so I guess we came back at the same time.

Q All right, I will accept that answer.

THE COURT: I think your point is made, Mr. Sherr?

MR. SHERR: I said I will accept that answer.

Q Then, again in your grand jury minutes, you subsequently testified on page 32 as to a third version, and I refer --

MR. PADGET: Objection. I move that it be stricken.

THE COURT: This is the third version?

All right.

MR. SHERR: As to the same incident.

THE COURT: All right, overruled.

Q Page 33, line 14:

"Q You traveled down from Canada together?

"A Yes. Well, not together, on the same flight."

Do you recall that question and answer?

A No, because we did travel on the same flight.

Q Then later on, on line 16, Mr. Padgett said;

"Q I am sorry?

"A Not together because it wouldn't look good.

"Q He sat on one" --

A I mean going -- go ahead, I am sorry.

Q "Q He sat on one part of the plane and you sat on another part of the plane?

"A Yes."

Do you remember that?

A Yes, when we boarded the plane. Then when the plane took off --

THE COURT: I think the question to you is do you remember being asked those questions and giving those answers.

A No.

Q Did you ever tell the grand jury that you sat together?

A I really don't remember if I told them.

MR. SHERR: Will counsel concede that nowhere in the grand jury minutes is there any statement by the witness that they sat together on the plane?

MR. PADGETT: I will not so concede.

THE WITNESS: It was probably never asked.

Q The question, "He sat on one part of the plane and you sat on another part of the plane," and your answer, "Yes."

Was that true?

MR. PADGETT: Objection.

A He did sit on one part and I sat on the other until it took off.

Q What? I can't hear you.

A I am sorry. He did sit on one part and I sat on the other, and then when it took off we sat together.

Q You didn't say that here, did you?

A I said that he sat on one end and I sat on the other, which is true, because we did sit separately.

Q But you didn't tell the grand jury that you sat together, did you?

A No, I never told them. They probably never asked. That's why.

Q When you got to New York, did you go to Mr. Mitchell's apartment?

A Not straight. We didn't go straight there.

Q Where did you go?

A We went to a girl's apartment in the 80's.

Q Yes?

A And we stayed there for a few minutes, and then we went to Mr. Mitchell's apartment.

MR. PADGETT: I can't hear you.

A Then we went to Mr. Mitchell's apartment.

Q At that time did you consider Mr. Mitchell as a boy friend?

A No.

Q Did you consider him as a customer?

A No. You could say --

THE COURT: The answer is no?

THE WITNESS: No.

Q You had slept with him and you had not charged him?

A So?

Q Therefore, you did not consider him as a customer?

MR. PADGETT: Objection.

Q Did you move into his apartment? I will withdraw the question.

A He moved me into his apartment, yes.

Q You had one bag with you?

A I had about two. I think I had two.

Q You had the same clothes that you got in Montreal to live for a week?



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A Yes.

Q What did you do after you moved into his apartment?

A I stayed there for about two months.

Q Did you sleep there every night?

A Yes, almost every night.

Q Did he sleep there every night?

A Not every night, no.

Q Almost every night?

A Well, sometimes, when he'd be getting up when I was coming in, so that he slept in the daytime.

Q Sometimes who slept in the daytime?

A Mr. Mitchell slept in the daytime.

Q You slept at night and he slept in the day?

A Sometimes he did sleep in the day. Sometimes he slept in the early evening. Sometimes he slept at night.

Q Did you sleep there every night?

A Did I sleep there every night?

Q Yes.

A Almost every night.

Q When you say almost, how often?

A Well, sometimes I would spend the night in jail.

Q Other than when you were in jail.

A Once in a while I would spend the night at another girl's house.

Q But other than that, you spent every night in Mr. Mitchell's apartment?

A In his bed, yes.

Q And Mr. Mitchell, except when he slept during the day, would spend every night there?

A Yes.

Q And when you came to New York from Montreal, did you have any money with you?

A No.

Q Who supported you in New York?

A Nobody supported me.

Q Who bought you food?

A I bought myself food.

Q How much money did you come to New York with?

A I didn't have no money because I had some money stolen when I was in Montreal.

Q You had what?

A I had some money, but it was stolen when I was in Montreal.

Q How much money did you have when you came to New York?

A Maybe about -- my money, you mean? Because you

do need over $50 to get across the border, but of my money, I had about $20, I guess.

Q When you came to New York and you moved into Mitchell's apartment, who bought your food?

A I bought myself food. I fed myself.

Q With the $20?

A No.

Q With what?

A What do you mean?

Q Where did you get the money to pay for your food?

A I worked.

Q Right away?

A That night, yes.

Q You started working, you worked all the time that you were, the whole time?

A I worked almost every night, yes.

Q Mr. Mitchell never gave you any money?

A $10 for expenses.

Q I suggest to you that you didn't start working until after you had been in Mr. Mitchell's apartment for two months.

A No, I started that night.

Q And I further suggest to you that during those two months, Mr. Mitchell gave you money regularly.

A No, he didn't.

Q In fact, he loaned you a sum in excess of $1000.

MR. PADGETT: I will object to this, your Honor.

THE COURT: I will allow it.

A That is not true.

Q It is not true?

A No.

Q I refer to your grand jury minutes, page 44, line 15. I ask you if you recall being asked this question and giving this answer:

"Q How much money hd he loaned you over that two-month period?

"A I guess about a thousand.

"Q About a thousand?

"A Yes."

Do you recall that question and answer?

A I don't remember. He probably did give me approximately -- maybe approximately, gave it back to me, what I gave to him. I mean I do have to eat and I do need expense money.

Q The question was how much money had he loaned you.

A He didn't loan me anything.

Q The question asked to you in the grand jury was

how much money had he loaned you over that two-month period, and the answer given by you is, "I guess about a thousand."

A I must have misunderstood the question.

Q He didn't lend you anything?

A No, he gave me.

Q He gave you a thousand dollars?

A Yes.

Q During that two-month period. He also gave you money any time you needed it?

A No.

Q I refer you to line 10 on the same page:

"Q When did he give it to you?

"A Well, whenever I needed any of the money, he would give it to me."

A Yes.

MR. PADGETT: Your Honor, I am sorry, I don't see that question and that answer anywhere on page 42.

MR. SHERR: Page 44, I am sorry.

MR. PADGETT: All right.

THE WITNESS: I mean if I needed nylons, he gave me money for nyons. If I needed a new dress, I didn't get no money for a new dress.

Q Miss Sauer, you have no problem with the English

language? The question was did you give the answer,

"Well, whenever I needed any of the money, he would give it to me."

A Yes, when I really, really needed something and I could not go without --

Q Didn't you jus tell us in answer to a direct question when I asked you when you needed money did he give you any, and you said no?

Didn't you just say that one minute ago?

A I guess I did.

Q Was that false?

A Yes.

Q You told us before, in answer to a direct question, that you never borrowed any money from James Mitchell?

A Did I borrow any money? I borrowed -- no.

Q The answer is you neve borrowed any, right?

A No.

Q I refer you to page 42, Counselor, starting with line 6:

"Q Did your parents send you any money?

"A No.

"Q Did your sister send you any money?

"A No.

"Q Any people in Canada send you any

money?

"A No.

"Q Did you borrow any money in New York?

"A Yes, from James Mitchell."

Do you remember those questions and answers?

A No, I don't.

MR. SHERR: Will counsel concede that the transcript contains the questions and answers as I have read them into the record?

MR. PADGETT: yes, among others.

Q Was it true?

A That I borrowed money from Mr. Mitchell?

No, I never borrowed money from Mr. Mitchell.

Q So if you said it before the grand jury, that you borrowed money from James Mitchell, it was a lie?

A Well, I didn't understand what was happening when I was at the grand jury.

Q You didn't understand the question, "Did you borrow money in New York," and the answer, "Yes, from James Mitchell"?

A I borrowed money --

Q Just answer the question, pleawse.

You didn't understand the question, "Did you borrow money?"

A Yes, I understand that question.

Q "Did you borrow money in New York," and the answer, "Yes, from James Mitchell"?

A You could call it a sense of borrowing, yes, sir.

Q Did you understand that question?

A Yes, you could call it a sense of borrowing if you want to put it that way.

Q I don't want to put it any way. I am referring to your answers here.

A Then what way are you putting it?

Q You gave that answer?

A Yes, I must have, because if it's written down, I must have.

Q Do you remember also being asked, continuing on the same page -- I will repeat that question so you can get the continuity:

"Q Did you borrow money in New York?

"A Yes, from James Mitchell.

"Q I am sorry?

"A From James Mitchell."

A I did get a few dollars from him.

Q "Q How much money did you borrow from James Mitchell?

"A Whenever I needed it."

A Yes, but when I got there that same night, so you call it a sense of borrowing.

Q Please, I haven't finished the question:

"Q He out of the goodnesss of his heart gave it to you, right?

"A Yes.

"Q For how long have you been borrowing money from James Mitchell?

"A Just when I was living, when I was staying with him."

Continuing on page 43:

"Q Did there come a time when you no longer borrowed money from James Mitchell?

"A Yes.

"Q Did there come a time when he asked for money back?

"A Sort of."

Do you remember any of those questions and answers?

33 A No.

Q Do you find this funny?

A No, I don't. I am sorry.

Q Would you like to reconsider your last answer on direct?

A What was my last answer?

Q That you never borrowed any money from Mr. Mitchell.

A No, I don't. You could call it sense of borrowing when I --

Q I am not going to call it anything, dear. Would you like to reconsider?

A I did give him the money back, whatever I --

Q Did you borrow money from James Mitchell during the first two months that you lived there?

A You could call it that, yes. I did need a few --

Q I didn't call it that, Miss. You called it that, Mr. Padgett called it that.

A I did need a few dollars once in a while.

Q Miss Sauer --

A Yes.

Q Do you understand the meaning of the word "borrow"?

A No. Why don't you tell me.

Q You don't understand the meaning of the word "Borrow"?

A Why don't you tell me.

Q Do you understand it?

A Yes, when you borrow something, you pay it -- you give it back again in the same condition that you got it.

Q Do you understand the meaning of the wored "loan"?

A Yes.

Q You heard the questions and answers that I read that I read that you gave before the grand jury?

A Yes.

Q Were they the truth?

A Yes.

Q Would you therefore like to change the answer you gave to me before?

A What answer was that?

MR. PADGETT: Objection.

MR. SHERR: I withdraw it.

Q Over how long a period of time did you borrow this thousand dollars?

A What thousand dollars?

Q This money that you borrowed or loaned, or whatever you want to --

A Over what period? He did give me approximately about a thousand dollars.

Q Over how long a period of time?

A As long as I was with him, about three months.

Q Were you working at the time that he was --

A Yes, I was working at the time.

Q Are you certain that it was a fact that you didn't go out hustling on the streets until after Mr. Mitchell asked for his money back?

A No, that is not a fact. I went out that same night. He didn't give me a thousand dollars.

Q I refer to page 43 of the grand jury minutes, line 5:

"Q Did there come a time when he asked for money back?

"A Sort of.

"Q What do you mean sort of?

"A Yes, he said, he told me --

"Q He told you he wanted his money back, and he told you you better go out in the streets and make some money for him, didn't he?

"A Not like that.

"Q Not like that, but that's what it meant?

"A Yes.

"Q Did you go out in the streets and make any money for him?

"A Yes."

Do you remember those questions and answers?

A No.

Q Are they the truth?

A Yes.

Q So it was after he asked you for his money back that you?

A The first time.

Q Excuse me, I haven't finished the question, please.

It was after he asked for his money back that he suggested to you that you go out into the streets to make some money back to pay him back; isn't that what you just said?

A The first time he gave me some money was crossing the border.

Q No, just answer the question.

A And I didn't give him the money back.

MR. SHERR: I move to strike the answer.

THE WITNESS: I did give him the money back. That was the first day I came to New York.

THE COURT: Strike it out.

You are being asked a different question. Listen carefully to the question.

Q Kindly answer the question. Your attorney, Mr.

Padgett --

MR. PADGETT: Objection. First of all, I am not the witness' attorney, and second of all there is no reason for colloquy between the witness and the attorney.

THE COURT: I understand the relationship.

Go ahead, put your question, sir.

MR. SHERR: Now I have lost it, Judge.

Q Isn't it a fact that it wasn't until after you had borrowed approximately a thousand dollars from him over a two-month period that you told the grand jury that Mr. Mitchell said he wanted his money back, and suggested that you go out in the streets and earn it to pay him back?

MR. PADGETT: I will object to the form of that. I don't understand the question.

THE COURT: Sustained as to form.

Q Is it a fact that after you borrowed money from Mr. Mitchell coming to approximately a thousand dollars, that he asked for his money back?

A You mean is that a fact? No, it's not a fact.

Q Isn't that what you said to the grand jury?

A That's what I told the grand jury, but that's not a fact.

Q You mean you lied to the grand jury?

A No, I didn't lie to the grand jury.

Q You just said --

A He did give me approximately --

Q Excuse me. You said that is what you told to the grand jury, but that is not a fact. You don't call that a lie?

A No.

Q What you told the grand jury was the truth or not the truth?

MR. PADGETT: Your Honor, at this time I have to object to the line of questioning. I think we are seeing the result of allowing counsel to read out of context and allowing him to read out of sequence. We now have a position where the witness stated that her testimony before the grand jury was such, and it is not.

THE COURT: Let me look at the grand jury minutes.

MR. SHERR: Page 43, your Honor.

MR. PADGETT: Your Honor, I submit counsel has read from about 20 pages of testimony.

MR. SHERR: Page 43 is the page I am reading from. Here is Xerox.

(Transcript handed to the Court.)

THE COURT: What was the question to which there was an objection?

THE WITNESS: Talking about what?

THE COURT: Why don't you start again, Mr. Sherr.

Q Miss Sauer, when you told the grand jury that Mr. Mitchell told you or that there came a time when Mr. Mitchell told you he wanted his money back, is that the truth?

A The money that he did lend me some money when I came across the border, and I did give it back to him. Yes, he did ask me for the money back, and I gave it to him.

Q And you told the grand jury that, or rather when the question was posed to you, he told you he wanted his money back and he told you you better go out in the streets and make some money for him, didn't you answer:

"Not like that.

"Q Not like that, but that's what he meant?

"A Yes."

Was that the truth?

A Yes.

Q So wasn't that the first time there was any conversation about your going out into the streets to pay back?

A When was that?

Q Excuse me -- to pay back moneys that he had loaned

you?

MR. PADGETT: Objection, your Honor, and I object specifically to the word "moneys", the plural. The witness is talking, I think, about the moneys which were given to cross the border. I think counsel is alluding to the thousand dollars.

MR. SHERR: I don't care what the witness is talking about.

MR. PADGETT: May I finish my statement, please?

MR. SHERR: Don't yell at me.

MR. PADGETT: Then don't interrupt me, please.

MR. SHERR: Don't yell at me.

MR. PADGETT: Then don't interrupt.

I think counsel is referring to the thousand dollars that I think is in the testimony, but the witness is referring to something else, and I think that is where the confusion lies.

MR. SHERR: I am referring to whatever the truth is, and it appears that this witness has testified --

MR. PADGETT: Objection.

MR. SHERR: -- before the grand jury.

Do you want to allow me to finish, Counselor?

THE COURT: Wait now, gentlemen. Why don't we excuse the witness, and Mr. Dorsa, would you go with

Miss Sauer just behind that door for a minute.

MR. SHERR: I am prepared to leave this point. It's fairly well established, and I am not going to pursue it any more.

THE COURT: All right, then we will not need to do it.

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Q Do you know what the Pimp Squad is?

A No. What is it?

Q Do you know what the Prostitution Squad of the New York City Police Department or the Vice Squad is?

A Yes, they are the -- a squad of detectives that go around busting prostitutes, right, and I guess the Pimp Squad is almost like that but they bust pimps. Is that true? I think that's what it is.

Q Were you contacted with reference to preparing to testify in this case by somebody from the New York City Police Department originally?

A Somebody sent me a subpoena.

Q How were you contacted originally?

A What, the grand jury or for trial?

Q The first time.

A The grand jury, some gentleman sent me a subpoena.

Q Sent you --

A They came and knocked on my door, and they gave

me a subpoena to appear.

Q Do you know who those people were?

A There was about three gentlemen.

Q Were they police officers?

A I think so.

Q Did you ever go to the police station?

A With them?

Q With any --

A The only time I been in a police station was when I got busted three years ago.

Q After you got the subpoena, did you have any meetings with Mr. Padgett and any members of the Police Department?

A No, I never saw Mr. Padgett until I appeared at the grand jury.

Q When you first saw Mr. Padgett, did you tell him youwere a prostitute?

A I really can't remember.

Q Did he ask you?

A I really can't remember.

Q You don't know whether he asked you your occupation?

A I can't remember.

Q Can you remember whether you were a prostitute?

MR. PADGETT: Objection.

THE COURT: I will sustain it.

Q Were you a prostitute at the time?

A Then? I was one, yes, at that time.

Q Mr. Padgett knew you were a prostitute?

A I don't know.

Q Mr. Padgett knew where you were operating from?

A I don't know.

Q He didn't ask you your address either?

A He probably did. I really can't remember.

Q Do you remember anything he asked you, or didn't he talk to you at all?

A Yes, he talked to me about the --

MR. PADGETT: Can we establish when this is?

MR. SHERR: The first time he saw her.

THE COURT: Wait a minute. We haven't got anything on the record at this point.

Do you want to put your question again, please?

Q The first meeting you had with Mr. Padgett was when?

A The first day I appeared at grand jury.

Q Was that June of 1973?

A I think so. It was around that time.

Q At that time when you talked to Mr. Padgett, did

he ask you your name?

A Yes, he did.

Q Did he ask your address?

A I think so.

Q Did he ask you your occupation?

A I can't remember.

Q Were you practicing prostitution at that time?

A Yes, I was, a little bit.

Q Were there any police officers present at any time when you spoke to Mr. Padgett?

A I really don't know. I can't tell a police officer from a lawyer.

Q Did you conceal from Mr. Padgett the fact that you were practicing prostitution?

A I can't remember. I might have.

Q Did there come a time when you told him that?

A I can't remember.

Q You can't remember whether you ever told Mr. Padgett you were a prostitute?

A I really can't remember if the subject came up.

Q You don't remember if the subject of your being a prostitute ever came up?

A Why, was it supposed to have come up?

Q You still practice --

A I am a woman who was subpoenaed to appear in grand jury.

Q You are still practicing prostitution?

A I see a few people, yes.

Q Are you a paid informer?

A No, I am not.

Q Did you receive any mo ney from the Vice Squad of the Police Department or the Government?

A No, I don't.

Q Do you know whether any communication has been made to anybody concerning the fact that you are presently practicing prostitution?

A Can you say that again?

Q Do you know whether or not any communication was made by Mr. Padgett or anyone in the Government to the Police Department concerning the fact that you are still practicing prostitution?

A I don't understand what you are saying.

Q Do you know whether Mr. Padgett advised anyone in the Police Department that you were still practicing prostitution?

A I really don't know. You have to ask him.

Q Are you still practicing prostitution?

THE COURT: Yes, she said that.

A I see a few people.

Q And you have since the first time you spoke to Mr. Padgett?

A Yes.

Q You haven't been arrested since then, have you?

A I haven't been arrested for three years.

Q During all this time from June until today, have any police officers visited you at your place of business?

A In my new place?

Q Either your new place or your old place?

A Well, they came in and gave me my subpoena when I was on 81st Street.

Q Other than that?

A No. They drove me home one night when they told me I had to appear at trial.

Q What night was that?

A May. It was my birthday, May 30th, and they tried to -- two of them came up because my lock was jammed, and they --

Q Two who?

A Two gentlemen that came and told me I had to come.

Q Police officers?

A Were they? Yes, they tried to -- they tried to

open my lock for me, but they co uldn't, so I --

Q So the Police Department know where you live, right?

A Yes.

Q And they know you are a prostitute?

A I don't know. I guess so, yes. They never asked me if I was.

Q Does Mr. Padgett know you are a prostitute?

A I don't know. You have to ask him. I guess he does. I mean it's been said so many times in this Courthouse, everybody knows I am a prostitute.

Q Have any promises been made to you in return for your testimony?

A No.

Q That you would be permitted to continue to practice?

A Nobody has. I haven't been busted for three years. I don't see why this has to change anything I am doing.

Q Do you have any arrangements with the police or anybody about being a prostitute?

A No, I never did and I never will.

Q You never did and you never will?

A No.

Q Have you ever paid anybody for protection?

A No.

Q Have you ever received any money from the Police Department or any governmental agency?

A Never.

Q Are you getting any money for coming to court today?

A I think I might get -- I think when I went to grand jury I got $20 for appearing, so maybe I will get $20 this time, because I think you get $20 every time you appear in court.

Is that true?

THE COURT: You are talking about a subpoena fee, I take it.

THE WITNESS: That's the only money I am getting, $20.

Q Have you been giving information to the Government about any other individuals other than Mr. Mitchell?

A No.

Q Have you been asked for information about any other individuals other than Mr. Mitchell?

A Yes.

Q By whom?

MR. PADGETT: I will object to this line of

questioning, your Honor.

THE COURT: Does this involve some on-going investigation that is underway?

MR. PADGETT: Well, your Honor, the witness has testified that she has not given any such information, so I think any further questions along -- any questions designed to elicit what questions were indeed asked of the witness, if in fact any were, I think would alert not only counsel but the members of the audience here as to some on-going investigations, yes.

The witness has testified quite frankly she did not give any information.

MR. SHERR: I will abandon that line, Judge.

Q How many times were you arrested for prostitution in New York?

A I think four times.

Q But you haven't been arrested at all since this investigation started?

A No, I haven't been arrested.

Q Were you ever told that if you didn't testify in this trial, or in any other proceeding, that you would be subject to arrest and imprisonment?

A Well, I think if you are subpoenaed and you don't appear --

Q No, just answer the question here.

Were you ever told --

A I am answering your question.

Q Were you ever told that if you didn't testify in this trial --

A If I did or if I didn't?

Q If you didn't, that you would be subject to arrest or imprisonment?

A Isn't that against the law?

THE COURT: Did anybody ever tell you that?

THE WITNESS: Well, I think someone did tell me if you are subpoenaed and you don't appear, that's contempt of Court.

Q I am not talking about appearing. I am talking about testifying.

THE COURT: Miss Sauer, just listen to the exact question.

THE WITNESS: I don't understand what he is saying.

Q Were you ever told that if you didn't testify against Mr. Mitchell --

THE COURT: No, no, I will sustain the objection to that as to form.

Q Were you ever told that if you didn't testify in

this court, that you would be subject to arrest and imprisonment?

A No.

Q Were you ever told that you would be subject to deportation proceedings?

A No.

Q You are not a citizen of the United States?

A I know that.

Q You are not legally in the United States?

A I am now. I came --

Q Pardon?

A Yes, I am.

Q You are legally in the United States?

A The last time I came through, I came through on my own name, yes.

Q As a visitor?

A As a visitor.

Q Have You applied for citizenship?

A When, for the States?

Q With Immigration?

A No.

Q Have you applied for an alien registration card?

A No, because I am just visiting the city.

Q You are just visiting for four years?

MR. PADGETT: Objection.

A Off and on, yes, I like New York. It's very exciting.

Q You have just been visiting here for four years?

A Yes.

Q You told us that in the last four years you have only been back to Canada for one month?

A I have been home a few times, yes.

Q For a total of one month?

A It's been about one or two months, yes.

Q Were you or were you not threatened with deportation?

A I was not threatened with deportation.

Q No one even brought up the subject that you were illegally in this country?

A The subject did come up. I did hear something about it.

Q When did it come up?

A First time I talked to Mr. Padgett, but, you know, I wasn't --

Q I am sorry.

A They could deport me without me being here.

Q You said something about Mr. Padgett?

A Yes.

Q When with Mr. Padgett, which meeting?

A About two months ago.

Q Was that when you were discussing the testimony you were going to give at this case?

A Yes.

Q That was the same time he asked you about the fact of failing to file tax returns was a criminal offense?

A It was brought up. I mean just as a casual conversation.

Q It was casual, but it was the same time he casually discussed with you that it was a crime not to file tax returns, and you casually --

A I know it's a crime not to file tax returns.

Q And he casually discussed with you that you could be deported from this country while he was discussing with you the testimony you were going to give in this trial?

A I could have been deported three years ago.

Q Is that correct?

A I could have been deported three years ago, yes, but that doesn't concern this case.

THE COURT: The question is, Miss Sauer, whether Mr. Padgett said anything to you on that subject.

THE WITNESS: No, he didn't.

Q Didn't you just say that when you were with Mr. Padgett, that he discussed --

A Yes, talked to Immigration people at the same time.

Q You can't answer while I am questioning you, dear.

A Yes, I can.

Q Didn't you just say to us that at the time you met with Mr.Padgett to discuss your testimony in this case, he discussed the fact with you that you were subject to deportation as being in this country illegally?

A No, he didn't. At the same time I talked to Mr. Padgett, I talked to Immigration people.

Q Didn't you just say to us before that Mr. Padgett discussed the deportation with you?

MR. PADGETT: Objection.

A No, I didn't say that.

MR. SHERR: Would you read back the record, please?

THE COURT: The record will stand.

MR. SHERR: I would liie to have the record read. She said twice before that she said yes.

THE WITNESS: I must have misunderstood your question.

THE COURT: It is argument.

MR. SHERR: It's not argument. It's the record. I would like to have the record read back.

THE COURT: Mr. Birnbaum, do you think you can, with the assistance of Mr. Sherr, find the place he was referring to?

MR. SHERR: It's about four questions back.

(The last six questions and answe4res were read.)

Q So it did come up, the question of deportation the first time you talked to Mr. Padgett?

A The very, very first time.

Q The very, very first time.

A I thought you meant this year.

Oh, in grand jury, I am sorry, I misunderstood what you said. The very first time I talked to him, no.

THE COURT: She said it three times.

THE WITNESS: I am sorry. I misunderstood you.

MR. SHERR: She is distinguishing between the very, very, very first time and the very, very first time, and the very first time.

Q There was one time when it did come up?

A With Immigration people, yes.

Q But with Mr. Padgett?

A No.

Q Didn't you just say that?

MR. PADGETT: Objection.

THE COURT: That is the fourth time. Go on to another subject.

MR. SHERR: It may be the fourth time, your Honor, but it's cross-examination, and she is refuting her own testimony.

THE COURT: The record speaks for itself at this point.

MR. SHERR: I have no further questions.

Excuse me just a moment.

CROSS EXAMINATION (Continued)

BY MR. SHERR:

Q When did you speak to the Immigration people?

A About two months ago.

Q How did you come about to talk to them? Did they call you down?

A There was a matter they wanted to discuss with me.

Q Is that the first time you talked to the Immigration people?

A Yes.

Q Was Mr. Padgett there?

A No.

Q Was Mr. Padgett aware that you were meeting with the Immigration people?

A I am not sure. I think so. I am really not sure. You have to ask him. I mean, it was a -- it didn't have any bearing on this case.

Q Did you report to Mr. Padgett that you had met with the Immigration people?

A No.

Q Did the Immigration people suggest to you that you were not here legally?

A They never suggested. I know I was here legally.

Q I am sorry, I didn't get that.

A I was -- at that time I was here legally, yes.

Q They called you down to tell you that you were here legally?

A No, there was a matter they wanted to discuss with me.

Q What was that matter?

A Should I -- I mean it's -- it has no bearing on this case really.

Q Did you say before when I asked you all those

questions about the fact that you were here illegally, and the fact that you could be deported, originally when you said something about Mr. Padgett and then you changed your testimony, didn't you say no, it was the Immigration people?

MR. PADGETT: Objection.

THE COURT: I sustain the objection to that.

Q Did anybody discuss the fact that you were here illegally, and that you could be deported, and you said yes, with the Immigration people? Didn't you say that?

A Yes.

MR. PADGETT: I don't understand that question at all.

THE COURT: I don't either.

A Yes, I did.

Q Didn't you say, when asked the question from me as to whether or not there were any discussion about your being here illegally and that you could be deported, and you said yes, with the Immigration people?

MR. PADGETT: I object to the question again.

THE COURT: Did you say that?

THE WITNESS: I says I did talk to the Immigration people, and they did tell me I was here

illegally, yes.

Q That you were here legally or illegally?

A Illegally. I was here illegally at that time, yes.

Q They told you you were here illegally, but you were here legally?

THE COURT: You are not listening carefully.

MR. SHERR: I can't hear.

THE WITNESS: I am sorry, my accent -- I am not an American.

THE COURT: She said at that time she was told she was here illegally.

Is that right?

THE WITNESS: At that time, yes.

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THE COURT: Next question.

Q That was two months ago?

A Yes.

Q And did they tell you you were subject to deportation?

A At that time I was, yes, they could deport me.

Q And did it ever occur to you that your testimony in this trial might influence a decision of the Immigration Department with respect --

A I never have, no.

Q Let me finish.

THE COURT: Let him finish --

Q -- with respect to whether or not you would be deported?

A Could you repeat that?

Q Did it ever occur to you that your testimony in this matter might influence the Immigration people as to whether or not you would be deported?

A No, because my problem --

Q Did it occur to you?

A It never occurred to me. It was entirely a different situation.

Q There is no question before you.

MR. PADGETT: I will be very brief, your Honor.

REDIRECT EXAMINATION

XX BY MR. PADGETT:

Q Miss Sauer, you say you were arrested four times in New York; is that correct?

A Yes, I was.

Q Do you remember when those four times were?

A It was from the period of June 1971 till, I think, August 1971.

Q You were a prostitute then; is that correct?

A Yes, I was.

Q Did you have a pimp?

A Yes, I did.

Q Who was your pimp?

A Mr. Mitchell.

MR. SHERR: I object to that as calling for a conclusion, and move to strike the answer.

THE COURT: Yes, I will strike the answer. The facts, I think, have been established.

Q When did you arrive in the United States?

A What day was it, May 20, 1971?

Q May 20.

How long a period of time transpired before you were arrested for the first time?

A I think I got arrested the first time in June.

Q June 11 to be exac[illegible] is that right?

A Okay, so I was here two and a half weeks.

Q Were you working as a prostitute then?

A Yes, I was.

Q Were you making money as a prostitute?

A Yes.

Q Were you giving that money to Mr. Mitchell?

A Yes, I was.

Q During the period May through the end of August

1971, how much money did you make as a prostitute?

A About $10,000.

Q How much of this money did you give to Mr. Mitchell?

A All of it.

Q How much money did Mr. Mitchell give back to you in toto from the very first time you met him until August, the end of August 1971?

A About $1000.

Q When was the last time you were arrested in New York?

A When was it, August, was it?

Q In which year?

A 1971.

Q You testified in the grand jury in August of 1973?

A Yes.

Q Did you tell the grand jury that you paid Mr. Mitchell $10,000?

A I can't remember.

Q Did you describe your relationship with Mr. Mitchell?

A I can't remember.

Q Referring to page 44, were you asked this question:

"Q How did you get the $10,000 that you gave James Mitchell?

"A I saw men.

"Q I am sorry?

"A I saw men.

"Q There is not much of a market for looking.

"A Pardon?

"Q How precisely did you get the money? Tell the grand jury.

"A They gave it to me.

"Q Out of the goodness of their hearts?

"A Yes.

"Q For no reason whatsoever?

"A No.

"Q You didn't do anything for the money?

"A What am I supposed to do for it? I just asked them for it. They gave it to me.

"Q Didn't you have sex with them before they gave you money?

"A Some of them, yes, but not all of them."

Did you then say in response to the question --

THE COURT: Were you asked those questions, and did you give those answers?

THE WITNESS: Yes.

Q Continuing on page 45:

"Q Of the $10,000, Miss Sauer, how much of it came from acts of prositution?

"A Most of it."

Were you asked those questions, and did you make those answers?

A Yes, I was.

Q Referring to page 47, were you asked thee questions and did you make these answers:

"Q What does the word 'pimp' mean to you?

"A Someone who makes it -- who tells a girl, 'Go on the street' and then takes money.

"Q What do you mean by going out on the street?

"A Pardon?

"Q What do you mean by going out on the street?

"A Having been a prostitute for him.

"Q And then take some money.

"A She gives it to him, or he takes it, whatever.

"Q Was James Mitchell your pimp?"

MR. SHERR: If your Honor please, at this point I have to object, because by indirection we have a conclusion on the part of the witness.

MR. PADGETT: Your Honor, if a prostitute for four years isn't capable of saying what a pimp is --

THE COURT: At this point I will permit it.

Q "Q Was James Mitchell your pimp?

"A Well, I was working on the street and --

"Q You were working on the street, you gave him the money, and you got the money for having sex with men.] Was James Mitchell your pimp?

"A Yes."

Were you asked those questions and did you make those answers?

A Yes, I did.

Q Was that true?

A Yes.

Q Was all of this before anyone had discussed your income tax or your deportation?

A This was before, yes.

MR. PADGETT: No further questions.

RECROSS EXAMINATION

XX BY MR. SHERR:

Q Do you keep books and records, Miss Sauer?

MR. PADGETT: Objection. This is not a subject of redirect.

A Books and records of what?

THE COURT: To what subject is this relevant on recross?

MR. SHERR: He brought up the $10,000.

THE COURT: That was on direct examination.

MR. SHERR: And he brought it up now.

THE COURT: But you had an opportunity to cross-examine as to it on your cross-examination, didn't you?

MR. SHERR: But he brought it up again now. I have a right to recross on the redirect. If he brought it up again on redirect, he had an opportunity to bring it up on direct. He brought it up. Now he brings it up on redirect. I can recross on it.

THE COURT: Ask your question.

MR. SHERR: I am sorry?

THE COURT: Ask your question.

Q Do you keep books and records?

A About what?

Q About your income from prostitution?

A No, but I know approximately --

THE COURT: The answer is no, I take, you do not keep books and records?

THE WITNESS: No, I don't keep and records.

Q How much did you make in June of 1972?

MR. PADGETT: Objection.

THE COURT: I will permit it.

A 1972? Approximately _- let me think -- 1972, for the month?

Q For the month.

A About, say about between $3500 to $4000.

37 Q Do you remember how many tricks you turned that month?

A No.

Q On what do you base your estimate of money without knowing --

A I base it on what situation I am in at the time.

Q What situation were you in at the time?

A I was -- I had my own business then and --

Q What do you mean you had your own business?

A My phone business.

Q YOu were a call girl then?

A Yes.

Q You do better as a call girl?

A I like it better, yes.

Q Do you make more money as a call girl than as a street girl?

A Well, you can, I guess.

Q Did you make more money as a call girl than you did as a street girl?

A No, because I didn't work hard.

MR. PADGETT: I will object, Your Honor. It's vague.

A I didn't work as much. I mean I didn't have to work as much as I did before because I was on my own and --

Q Do you have a standard rate?

A Not really.

Q Upon what do you base this figure of three or four thousand dollars in June of 1972?

A Because business was pretty good at the time. It was June, it was -- it's not best for month because everybody is starting to go away. I had my phone business, and it was in operation for three, four months so --

Q How much money did you make in August of '72?

A August -- about 3000. It's a bit slow in August because a lot of people go away.

Q How about May of '73?

A May of '73, that was last year.

THE COURT: Now you are beyond the scope of redirect.

Q In other words, all your figures are estimates based upon what you feel you average during good months and bad months; is that it?

A Yes, and if I worked hard and if I didn't work

hard.

Q Do you remember when you worked hard and didn't work hard?

A Yes.

Q This sum in excess of $200,000 that you have earned in the last three years --

MR. PADGETT: I will object to this, your Honor.

THE COURT: Yes.

MR. SHERR: She testified she earned between eighty and a hundred thousand dollars.

MR. PADGETT: Not on redirect.

MR. SHERR: Maybe I am wrong.

Q Was it 40 or 50,000? How much did you testify you earned a year?

MR. PADGETT: There was no testimony on redirect.

THE COURT: This is way beyond the scope of any recross, Mr. Sherr. Is there something crucial that you have in mind that you overlooked that you wanted to get at?

MR. SHERR: What I am trying to get at, your Honor, is you have a witness who picks a number out of the air of $10,000. There is no substantiation or corroboration on it, and I'd like to find out if she is making all that money, where it is. If this woman made $250,000 in the last two and a half years, does she have $250,000,

or is she just talking a lot of hair air, to be very blunt? If she is making the kind of money she has, she has earned $250,000 tax free in the last two and a half years.

MR. PADGETT: Your Honor, that is the same $10,000 that was supposedly plucked out of the air on direct examination. It's way beyond the scope of redirect. It should not be permitted.

MR. SHERR: I ask your Honor's indulgence to permit me.

THE COURT: It isn't that sum of money anyway, even given her testimony. It's her highest figure. Why don't you establish what it is.

MR. SHERR: I think we did on original cross, but frankly I have forgotten the amount.

I am sorry, it was around $50,000 a year. That is my error, and I apolog[illegible] the Court.

BY MR. SHERR:

Q You earned approximately $130,000 since June of 1971 as a prostitute in this city on which you paid no tax; is that correct?

A From 1971, did you say?

Q Yes.

A Till when?

Q To now.

THE COURT: Through '73.

Q Approximately three years. In three years, you testified that you earned about $50,000 a year from prostitution, so the last three years you have earned $150,000; is that correct?

A Approximately, maybe a bit less.

Q On which you paid no tax: is that correct?

A Right.

Q Do you have that $150,000?

THE WITNESS: Do I have to answer?

THE COURT: Do you have it somewhere?

THE WITNESS: Not that much, no. I do have a high overhead.

Q How much do you have?

MR. PADGETT: I fail to see the purpose of this.

MR. SHERR: The purpose of this is because I am challening the credibility as to the amounts.

THE COURT: He is trying to establish whether or not she is telling the truth as to the fact that, were they actually earned, what happened to it.

Q How much money do you have now?

A I have about $4 on me in my purse.

Q How much money do you have in the banks or in vaults or any place else?

A I don't know. I have to really add it up.

Q Give us your best estimate.

A A few grand.

Q A couple of thousand dollars?

A Yes.

Q Where do you have it?

MR. PADGETT: Objection.

THE COURT: Do you have it in the bank?

THE WITNESS: Yes.

THE COURT: All right.

Q In your name?

A No.

Q In whose name?

MR. PADGETT: Objection.

THE COURT: Is this relevant?

Q Is it in one of your aliases or in the name of a third party?

MR. PADGETT: Objection.

THE COURT: Where are you going to go from here?

Q All right.

What happened to the other $148,000?

A I spent it. That's why I make money, to spend it.

Q It cost you $148,000 to live for three years yourself? That's net, your tax free income now.

A It takes -- for me, yes.

MR. SHERR: Took you $148,000. That's all.

REDIRECT EXAMINATION

XX BY MR. PADGETT:

Q Miss Sauer, as a prostitute with a pimp, you made money each night?

A Yes.

Q At the end of each night, you gave that money to the pimp?

A Yes.

Q And at the beginning each working day, you got some money from the pimp?

A Yes.

Q 10 or 20 dollars, I believe you testified?

A Yes.

Q What happened to the money that you gave the pimp the night before? Did you ever see that again?

A No.

MR. PADGETT: Thank you.

RECROSS EXAMINATION

BY MR. SHERR:

Q Didn't you testify that after Mr. Mitchell, that

you had no other man or any other --

A Pardon?

Q Have you been employed or associated with any pimp from August of 1971 to date?

A Yes.

Q For how long?

A Six, seven months?

Q When?

A After I left Mr. Mitchell.

Q Would that be the six, seven months directly after?

A Afterwards, yes.

Q How about for the three years and three months after that?

A Well, it was a different situation. I did not work as much as I did before.

Q Did you have a pimp?

A No, I didn't have a pimp.

Q So for two years and three months you had no pimp, and for six or seven months after Mr. Mitchell, you had a pimp, you say?

A Yes.

Q Did you advise Mr. Padgett of this?

A Yes, I did.

Q Did you advise Mr. Padgett of this?

A Yes, I did.

Q Did you give Mr. Padgett the name of this pimp?

A I don't think -- no, I didn't.

Q Did he ask you for the name of this pimp?

A No, he didn't.

Q How much money did you turn over to this pimp?

A You want me to figure that out? Is it important?

THE COURT: Do you want her to figure it out?

MR. SHERR: I would like to know roughly. It strikes me as very curious that she advised the Government that she had a pimp for seven months and turned over all her money to him, and they never asked the name, but they indicted Mr. Mitchell who she said she was with for two or three months, and I am wondering why.

THE WITNESS: Because it was a different situation.

Q How much money did you turn over to this pimp for the seven months that you were --

A I was subleasing one of his apartments.

Q Just tell us how much money you turned over to him?

A I have to figure it out. I was subleasing one of his apartments. I was working off his phones, so

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it was a different situation, and I gave him the rent money and it was a different situation.

Q Mr. Padgett never explored this with you as to the --

A No, he didn't.

Q As to how much you gave this pimp or the identity of the pimp?

A No, he didn't.

MR. SHERR: I have no further questions.

THE COURT: You may step down.

(Witness excused.)

THE COURT: We are going to stand in recess Mr. Gora, I take it your client is next to be called?

MR. GORA: Yes.

THE COURT: We are going to stand in recess until a quarter past two. I do want to say, so that you have some idea of where we are at that time, I am going to deny the privilege as applicable here on several grounds which I will be pleased to put on the record after lunch, but I have concluded that your client is not entitled to the privilege that you sought to have available to her, and so I think you should be thinking in terms of what steps you want to take, if any, given that ruling that I am going to

mbs

be making at 2.15.

MR. GORA: Has your Honor had the opportunity to consider the brief?

THE COURT: I did.

MR. GORA: The full brief submitted this morning.

THE COURT: I did, and we researched the law last night, and we considered the affidavits of your colleagues and the various points that you have raised, and I do not believe in this context that they are applicable, and I will go into that in some detail so that you have a record which you have made, but I think you should be thinking in terms of the fact that that is what I will be doing.

MR. GORA: Thank you.

THE COURT: So we will stand in recess until 2.15.

(Luncheon recess.)

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AFTERNOON SESSION

(2.15 p.m.)

(Trial continued.)

THE COURT: Mr. Padgett, do you want to put the witness on the stand?

MR. PADGETT: Yes, your Honor.

At this time could we recall Susan Hall, whose appearance was interrupted yesterday?

THE COURT: Yes.

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S U S A N H A L L , recalled as a witness by the Government, having been previously sworn, resumed and testified further as follows:

THE CLERK: You remain sworn from yesterday.

THE COURT: Before you start, Miss Hall, I am addressing this both to you and your counsel, so that everybody is apprised of my views here.

I have considered the memorandum of law that was submitted to me and the various affidavits of yourself and those of your colleagues in the fraternity, if I can refer to it that way, and I have considered the two books, Exhibits 25 for identification and 27 for identification, and your statement to the Internal Revenue Service dated February 14, apparently without date, which is Exhibit 26

for identification, and your affidavit of May 2, 1973 which was made also to the Internal Revenue agent, which I will have marked as Court's Exhibit 2.

Considering all of these matters and applying what we lawyers are instructed to call the balancing test that is set forth in such cases as Baker and Brandsberg, I do not find that the privilege is applicable In this situation. I do not find that for five reasons, and I will state that so Mr. Gora is fully apprised of the basis of my rling.

First, I find that the testimony you are being asked to give is highly material in this case, a criminal case, as opposed to the civil cases such as Baker, in that it goes to the very heart of the allegations of the Government's case.

Secondly, I do not see any other way to get at this proof of payment in this case other than from the payor.

Thirdly, the fact that this is a criminal case and not a civil case, as I happened to mention earlier.

Fourth, two things:

First, that there is revealed in the two affidavits that I have mentioned virtually all of the facts certainly that the Government wants to adduce except for

the identity of who Mr. Silky is; and secondly, that you executed, and apparently you were in receipt of, a receipt for certain moneys. I have forgotten at whose instigation it is at the moment, but that receipt is marked in evidence, is it not, Mr. Padgett, the Porcupine Productions, Inc. receipt?

MR. PADGETT: I am not sure it's been received in evidence. I know it has been received --

THE COURT: Mark it for identification in any event.

Finally, I don't find that the defendant in this case, assuming as I do for present purposes of this motion -- let's put it this way -- I do not find, passing whether Mr. Mitchell is in fact the person depicted by photograph on the cover of Exhibits 25 and 27 for identification -- I do not find that that person has disclosed matters to you with any enormous concern for confidentiality.

It is true that the names of the people, as it says in the author's note at the beginning of Exhibit 27, have been changed "To protect the guilty." It says;

"Only names have been changed."

There is an acknowledgment that the people who appear in the photographs are not models.

As a consequence, I do not find that whoever is

the subject of these two books had any overwhelming desire that he not be revealed, because his picture is throughout the books, a description of him in enormous detail is contained in the books; and so I do not find that the statements were made with that expectation of confidence which one does find in some cases that have been given to me for consideration.

So for those reasons I overrule the objection to the testimony that we began to adduce testerday, and I will rule that the privilege here does not apply.

I appreciate that there is in certain cases a First Amendment privilege, but on the balance, and taking into account the factors as I have, I do not feel that it applies here, and I deny your motion.

Mr. Gora, I think the best way to proceed, depending -- I take it you have talked with Miss Hall about her decision would be.

MR. GORA: We have spoken, based on your Honor's indication at the break before lunch.

THE COURT: Right.

MR. GORA: Might I ask this, your Honor:

Should Miss Hall, on the basis of the grounds set forth in our various papers, respectfully and orderly decline to order certain questions, I assume your Honor

would direct her to answer them?

THE COURT: I will.

MR. GORA: Can your Honor give us any indication what consequences would flow from a respectful refusal to answer any of those questions?

THE COURT: Yes, I would. Assuming that the questions are proper ones and relevant, it would be my intention that I would sentence Miss Hall in civil contempt for the lesser of three periods: either until the questions were answered, or until this proceeding was terminated, or for a period of 14 days.

MR. GORA: In other words, your Honor, the length would be no more than 14 days?

THE COURT: That's correct.

MR. GORA: Would it disrupt the proceeding excessively if I spoke with Miss Hall for just a moment, because frankly --

THE COURT: Not at all.

MR. GORA: Your Honor, part of our position turned on your ruling on the claims that were raised. It's my understanding that you ruled that there were First Amendment interests involved, but in this particular case, balancing the interests on various sides --

THE COURT: I am taking into consideration the

fact that this is a First Amendment type situation, but nevertheless, given that, I do not feel that it is such a situation that, balancing the factors, that the privilege does apply in this case.

MR. GORA: Thank you. If I might speak with Miss Hall --

THE COURT: You certainly may.

Do you want to speak out in the hall?

MR. GORA: No, just right here.

(Pause.)

MR. GORA: Your Honor, one final housekeeping detail, because I have been reluctant throughout this to disrupt these proceedings. I would, just to preserve the record, should that become necessary, like to object at each question and elicit an instruction.

THE COURT: You have to, because until the questions have been put and answered or refused, there is no issue.

MR. GORA: Thank you, your Honor.

THE COURT: Go ahead, Mr. Padgett.

DIRECT EXAMINATION (Continued)

BY MR. PADGETT:

Q Miss Hall, yesterday you indicated, did you not, that some time in 1972 you made certain payments to a cor-

poration known as Porcupine Productions; is that correct?

A Yes, Mr. Padgett.

MR. SHERR: If your Honor please, at the time these questions were posed I asked your Honor for a continuing objection.

THE COURT: On the ground that it's not relevant to the issues raised in the indictment.

MR. SHERR: Yes, sir.

May I have the same objection?

THE COURT: You may have the continuing objection.

Q Miss Hall, I show you this check, or actually this Xerox copy of two sides of a check, and I ask you if you recognize it.

A Yes.

MR. PADGETT: May this check, in two pieces, be received as Government's Exhibit 28 for identification.

(Government's Exhibit 28 was marked for identification.)

xx Q Miss Hall, does this check bear your signature?

A Yes.

MR. SHERR: If your Honor please, maybe we better have them marked 28-A and 28-B, because when he says does this chec k --

MR. PADGETT: It's the front and beck of the same

check.

MR. SHERR: I am sorry. I withdraw it.

Q Will you point out your signature, please?

(The witness indicated.)

Q You pointed out in the lower right-hand corner the name "Susan Hall"; is that correct?

A Yes.

Q Can you tell us to whom this check was made payable?

A Porcupine Productions.

Q Can you tell us on what date that check was drawn?

A August 1st, 1972.

Q And the sum of this check was $1000; is that correct?

A Yes.

Q Miss Hall, when you told us yesterday that you made payments to a corporation known as Porcupine Productions, was this one of the payments to which You referred?

A Yes.

Q I take it then that there were other payments; is that correct?

A Yes.

Q How many other payments were there in 1971 or

1972 to Porcupine Productions, a corporation?

MR. GORA: Your Honor, we will object to that on behalf of Miss Hall.

THE COURT: Objection is overruled.

Miss Hall, you are directed to answer.

A A payment was made in July of 1971 and in -- I believe -- and in -- I am not sure whether it was May or June or 1972.

Q Is it your testimony then that there were a total of three payments made to Porcupine Productions, one in May or June or 1971, one approximately a year later in '72, and this third payment on August 1st of 1972?

THE COURT: I think, Mr. Padgett, there is a check which is 1972. There is a payment she said she made in May or June of 1972 and one of July 1971, if my memory serves me correctly.

MR. GORA: Same objection, your Honor.

THE COURT: Yes.

Overruled, and the witness is directed to answer.

Q Addressing myself to --

MR. SHERR: If your Honor please, since we are now in 1971, I have to move to strike out the answer in that it relates to a check payable to a corporation which

is not a named defendant or conspirator in this proceeding.

THE COURT: Yes, I appreciate that.

The objection is overruled.

Q Addressing myself, Miss Hall, to the first payment made to Porcupine Productions, can you tell us for how much that payment was?

MR. GORA: Your Honor, I am afraid I must object.

THE COURT: The objection is overruled.

The witness is directed to answer.

A I should perhaps clarify myself at this time.

A payment was made in July of 1971, but it was made to an individual, and it was receipted in 1972 by Porcupine Productions.

Q Was the payment made to an individual on behalf of the corporation?

A At the time that it was made, no.

Q But a payment was made to an individual as an individual?

MR. GORA: Your Honor --

THE COURT: Yes, I will sustain the objection as to form. This goes to conclusions.

MR. GORA: I am not objecting as to form. That is not my position.

THE COURT: I know. I am sustaining the

objection.

Q How much was that payment, Miss Hall?

A $1000.

Q Was that payment in cash or check form?

A Cash.

Q You say thereafter in 1972 that payment was receipted for by Porcupine Productions?

MR. GORA: We object, your Honor.

THE COURT: Yes, overruled.

The witness is directed to answer.

A The payment was receipted in 1972 by Porcupine Productions.

Q Miss Hall, I show you Government's Exhibit 14 in evidence.

I ask you if you recognize it.

A Yes.

Q Can you tell us how you recognize it?

A It was a receipt that was provided to me.

THE COURT: "It was a receipt that was provided to me."

Q Was that the receipt provided to you as a receipt for the moneys paid to Porcupine Productions about which you have testified?

MR. GORA: I object, your Honor.

MR. SHERR: I object to that too.

THE COURT: I will sustain the objection as to form.

Q When was that receipt provided to you?

MR. GORA: I object, your Honor.

THE COURT: Overruled.

A When was that -- was the receipt here presented to me?

Q Yes.

A I believe it's dated July 17, 1972, and I would have to look at my calendar, but I believe that I received it on that date.

Q That receipt mentions the sum of $2000, does it not?

A Yes.

Q You have indicated that in 1971 the sum of $1000 was received by an individual; is that correct?

A Yes.

MR. GORA: Your Honor, we will object. That question has been answered, but I would like to object.

THE COURT: Yes.

MR. GORA: May I have a continuing objection on behalf of the witness to these?

THE COURT: If you wish to raise any issue in

any other court, I think you are going to have to raise it on a question-by-question basis.

MR. GORA: Yes, sir.

THE COURT: I think I would prefer that.

Q I take it then that there was a second payment of $1000 which is covered in that receipt, Government's Exhibit 14: is that correct?

MR. GORA: I object.

THE COURT: Overruled.

The witness is directed to answer.

A Yes.

Q When was that payment made?

MR. GORA: I object, your Honor.

THE COURT: Same ruling, same direction.

A I believe in May 1972.

Q Was that payment also made to an individual?

MR. GORA: I object, your Honor.

THE COURT: Overruled.

MR. SHERR: I have a continuing objection on all these 1972 payments.

THE COURT: Yes, I appreciate that. That is overruled.

A As far as I know.

Q Were you present when that payment was made?

A No, I was not.

MR. GORA: I object, your Honor.

THE COURT: Overruled.

Q Was that payment made in cash or by check?

A In cash.

MR. GORA: I object.

THE COURT: Same ruling.

Q Did you ever speak to anyone who represented Porcupine Productions?

MR. SHERR: I object to that.

THE COURT: Yes, I will sustain that objectioni

Q In 1972 did you speak to David Pravda?

MR. GORA: I object, your Honor.

THE COURT: Overruled.

MR. SHERR: I also object.

THE COURT: Overruled.

Just yes or no.

40 MR. GORA: Your Honor, the objection is on the grounds that information in response to that question might tend to reveal the source.

THE COURT: All right. Overruled.

The witness is directed to answer. It only calls for a yes or no answer.

A Yes.

Q In 1972 did you receive from David Pravda Government's Exhibit 14 in evidence?

A Yes.

Q In 1972 did you give a sum of money in cash or check form to David Pravda?

MR. GORA: We object, your Honor.

MR. SHERR: Objection, your Honor. Whether she gave any money in 1972 to a David Pravda, it's completely irrelevant.

THE COURT: Gentlemen, come up to the bench, please, for a moment.

(At the side bar.)

THE COURT: Mr. Padgett, refresh my recollection. What did Mr. Pravda testify about his authority and what he did? Because you are tying it in, obviously, with him.

MR. PADGETT: Yes, sir, I believe Mr. Pravda testified that in August of 1972 he received from Miss Hall a check in the amount of $1000 which was deposited in Porcupine Productions' account.

THE COURT: Then he gave $850 --

MR. PADGETT: To the defendant, Mr. Mitchell.

THE COURT: To Mr. Mitchell. All right, then I will allow the question.

Before we break up, Mr. Gora, I gather that Miss Hall is going to answer questions here, because the only basis, frankly, for you objecting and my directing is if you want to lay a foundation for her not answering. Since she has answered --

MR. GORA: Well, your Honor, frankly, her further ability to cooperate depends upon the questions asked. There are areas that she has represented to me dealing with identification that she feels that she cannot answer; so I would like to be able to continue to object.

THE COURT: In other words, when you get down to the area of identification, she is not going to answer. Why don't you save your fire for then rather than now, because if she is going to answer under these directions, there is no purpose in objecting.

MR. GORA: I think it's an excess of caution, your Honor, in the event we do have to appeal in her behalf.

THE COURT: Obviously, if there is to be an appeal here, you are going to have to go at it very quickly, because we have an on-going trial.

MR. GORA: I understand that.

THE COURT: I will give you a stay, obviously, for purposes of getting such review as time will permit.

MR. GORA: Would that be a stay of the order of confinement?

THE COURT: Yes, until the morning. I don't say this in any threatening way at all. You asked me what my feeling was, and obviously if I have ruled that a certain area is not privileged, and then you ask me what I will do about it, I tell you what I will do.

MR. GORA: I appreciate that, your Honor.

THE COURT: But all my suggestion was that if you are going to permit her to answer certain questions, there is no need for objection to them.

MR. GORA: Your Honor, I assure you that if I knew in advance that that were the case, I wouldn't object.

THE COURT: All right.

(In open court.)

THE COURT: Mr. Sherr, your objection is overruled.

MR. SHERR: I had forgotten that I had made one.

MR. PADGETT: May I have a moment, your Honor? I just want to speak briefly with Mr. Gora.

THE COURT: Very well.

(Pause.)

MR. PADGETT: May my last question to the witness be read back, please?

THE COURT: Yes.

(The last question was read.)

Q Your answer, Miss Hall?

A Yes.

Q To whom was that check made out?

A Porcupine Productions.

Q That indeed is Government's Exhibit 28 for identification, is it not?

A The one that I saw earlier. I have forgotten the number.

Q It is this check, 28?

A Yes.

Q Miss Hall, what was the name of your publishing company?

MR. GORA: I object, your Honor.

THE COURT: Overruled.

A Do you mean -- I have a company that I consider a packaging company, which I am a 50 per cent owner of. There is also a publisher involved in this book.

Q Was there a royalty agreement between yourself and either a packaging company or a publisher concerning royalties which resulted from the sales of "Gentlemen of Leisure", the book you authored?

MR. GORA: I object, your Honor.

THE COURT: Overruled.

MR. SHERR: I object, your Honor. Any royalty agreement between two other parties not involving the defendant in any way certainly is not relevant.

THE COURT: Well, if it is not relevant then it will have no effect on me. If it leads to something relevant, I will allow it.

Overruled.

MR. PADGETT: May my question be read back, please?

(The last question was read.)

A As I understand your question, Mr. Padgett, I made an agreement -- I am a party to an agreement with New American Libary, the publisher of the book.

Q May that agreement be termed a royalty agreement?

A It's a general publishing agreement. Royalties are part of it.

Q Did you enter into a royalty agreement or any agreement which discussed royalties with any other corporate or individual entity other than the New American Library?

MR. GORA: I object, your Honor.

THE COURT: Overruled.

A Yes.

Q Was the entity with whom you entered into with

this royalty agreement a corporate or individual entity?

MR. GORA: I object, your Honor.

THE COURT: Overruled.

Mr. Padgett, where are you going with this?

MR. PADGETT: May we have a side bar conference, your Honor?

THE COURT: If this is a lead up to somewhere, I will overrule the objection, and you go ahead.

MR. PADGETT: I think it will be relevant, your Honor, and will be connected.

THE COURT: Go ahead, I will permit it.

A An individual I think is the --

Q I am sorry?

A Was your question -- I am sorry.

Q The entity with whom you had this other royalty agreement, was that entity an individual, that is to say, a person, a living person, or a corporation?

A An individual. I believe there was a -- an assignment to a corporation.

Q What was the name of the corporation to which the assignment was made?

A Porcupine.

MR. GORA: Objection.

THE COURT: Overruled.

A Porcupine Productions.

Q Were the sums of money about which you testified here today paid to Porcupine Productions pursuant to this assignment of royalties?

MR. GORA: Objection.

THE COURT: Overruled.

A I'm not sure that I clearly understand that question, Mr. Padgett.

Q I will go back.

You stated that you had entered into an agreement, a royalty agreement with New American Library as well as a private individual. Addressing ourselves to the royalty agreement between yourself and this private individual, whomever he or she might have been, you stated that the royalty payments were assigned by this private individual to a corporation, namely Porcupine Productions.

My question then, Miss Hall, is, since you have testified about some moneys today which were paid by you to Porcupine, were these moneys paid pursuant to that assignment of royalties about which you just talked?

A The check to which we referred to was.

Q That would be Government's 28, this check of August 1st, 1972. Do you know who made this assignment of royalties to Porcupine Productions?

MR. GORA: Object.

THE COURT: Your objection which goes to the privilege I overrule.

A Yes.

Q Was this individual who made the assignment of moneys the same individual to whom you paid the moneys in 1971 and 1972, that is to say, the first two payments?

MR. GORA: Object, your Honor.

THE COURT: Overruled.

A Yes.

41 Q Is that individual here in court?

MR. GORA: Object, your HOnor.

THE COURT: Overruled.

THE WITNESS: Judge, I respectfully decline to answer that question on the grounds of the First Amendment.

THE COURT: I direct that you answer.

I take it that, notwithstanding my direction, you decline to answer?

THE WITNESS: Notwithstanding your direction, I decline to answer.

THE COURT: All right.

Do you have any further questions you want to ask?

MR. PADGETT: I am sorry, I didn't hear the

witness.

THE COURT: She says she declines to answer notwithstanding the Court's direction.

Do you have further questions you wish to put?

MR. PADGETT: Yes, I do, your Honor.

THE COURT: Proceed.

MR. PADGETT: Your Honor, may I have the affidavit which was made available to you yesterday?

THE COURT: You gave me two. One is now 26 for identification and the other is Court's Exhibit 2. You may have both of them. I suggest if you are going to use the other one that you make it your own exhibit in addition to mine.

MR. PADGETT: Very well, sir.

MR. GORA: Would it be possible to proceed through the rest of Mr. Padgett's examination and then let me confer with my witness to discuss the questions that have not been answered?

THE COURT: Absolutely. I will give Mr. Padgett a chance to put the questions he wants to put, and at that time we will take a brief recess.

Q Miss Hall, you submitted two affidavits to agents of the Internal Revenue Service, did you not?

A Yes, Mr. Padgett.

Q I show you Exhibit 26 for identification. I ask you if that is a copy of one of the affidavits which you submitted to agents of the Internal Revenue Service?

A Yes, Mr. Padgett.

Q I show you this affidavit in two pages, and ask you if that is the second affidavit which you submitted to agents of the Internal Revenue Service.

A Yes, Mr. Padgett.

MR. PADGETT: Your Honor, this, I believe, is a copy of Court's Exhibit 2. May it be received as Government's Exhibit 29 for identification.

(Government's Exhibit 29 was marked for identification.)

xx

Q Miss Hall, your statements contained in these two affidavits, that is to say, Exhibits 26 and 29, were true statements, were they not?

MR. SHERR: Excuse me, your Honor, I have to object to this. This is a Government witness. I don't know whether he is trying to contradict or impeach his witness. I don't know any foundation or basis upon which he can introduce affidavits or other statements.

THE COURT: I will sustain the objection but not for the reasons that you stated. I will sustain the objection on the ground there has been no statement of what

the contents are, nor is the exhibit in evidence.

Sustained.

MR. PADGETT: Your Honor, I would ask in view of the witness' position that she be declared a hostile witness, and I be allowed to lead.

THE COURT: I will permit you to lead. No farther than that.

MR. GORA: Your Honor, could you just explain to Miss Hall what hostile witness means?

THE COURT: Miss Hall, to lawyers the term hostile witness means a lawyer examining may interrogate by means of leading questions in which the answer is assumed in the question, and the witness is asked to respond yes or no. A non-leading question is where a witness is asked a question what happened, and then the witness will tell you, which is in narrative.

Given your obvious reluctance and hesitance here, notwithstanding the Government has subpoenaed you as a witness, I am going to permit them to interrogate you by putting leading questions to you. Hostile is a legal word of art. It has to do with the manner of questioning. It sometimes has to do with the stance of the witness, but I don't feel it's necessarily appropriate in this case.

Q Miss Hall, you were the author of Gentlemen of

Leisure, were you not?

MR. GORA: I object, your Honor.

A Yes.

THE COURT: I didn't hear the beginning of that.

(The last question and answer were read.)

THE COURT: She answered that yesterday.

The objection is overruled.

Q Will you answer, please?

A Yes.

Q Are you proud of it?

MR. SHERR: I object.

THE COURT: Yes, sustained.

Q Do you consider it a worthwhile journalistic enterprise?

MR. SHERR: I object, if it please your Honor. The merit, the relative journalistic merit --

THE COURT: Yes, I will sustain that objection.

MR. PADGETT: Your Honor, if I may be permitted to explore this line, I seek to show through this witness that she would not have put anything in her journalistic endeavor, that is to say, "Gentlemen of Leisure," unless it was indeed true.

THE COURT: Why don't you then show her the part that you want to adduce in evidence and ask her if that in

fact is so.

I will sustain that objection.

MR. PADGETT: I am trying to avoid having her assert a privilege again.

THE COURT: I sustain the objection.

MR. GORA: Your Honor, --

THE COURT: Mr. Gora, there is nothing before us at this point.

MR. GORA: But I would like, if Mr. Padgett is getting into content and truthfulness of content of the book, that is an area that I thought I had an understanding last week with Mr. Padgett would not be probed.

If possible, I might like a two-minute recess to confer with my client at this point with regard to her refusal to answer that one question.

THE COURT: All right, we will take a five-minute recess, but I must say that whether or not there is some understanding, and I do not regard that as binding upon any part in a case where evidence is sought to be adduced, and if evidence is properly sought to be adduced, the fact that there may have been some understanding that certain areas would not be gone into I do not regard as contractually binding, certainly upon me as the trier of the fact as well as the presiding judge here.

So if you want to have a recess, we will take a five-minute recess, but I do want to make that observation.

MR. PADGETT: Might i just put on the record, your Honor, that the there was an understanding as to what the extent of my direct examination would be up to the point, if any, of Miss Hall's refusal to answer. Since he has refused at this point to answer, asserting her privilege, and she has been directed and continues to refuse to answer, I feel that I am now free to enter into those areas and explore those areas which were not covered by the agreement.

(Recess.)

MR. PADGETT: Your Honor, at this time I would ask that the question which was addressed to the witness prior to her refusal to respond be at this time reread by the reporter to the witness.

(The question was read as follows:

"Q Is that individual here in court?")

MR. PADGETT: Perhaps we could read the question which preceded that and makes that question specific.

(The question and answer preceding the question previously read were read.)

MR. GORA: Your Honor, we will object again.

THE COURT: I overrule the objection.

Q Miss Hall, I put that question to you again: Is that individual here in court?

A Mr. Padgett, is it possible to understand the question, is the individual to whom the $1000 cash payment in July of 1971 was made in this room?

THE COURT: What is that answer?

(The last answer was read.)

Q Miss Hall, I will rephrase the question: Is the individual to whom you paid $1000 in 1971 here present in court?

A Yes, Mr. Padgett.

Q Will you point him out to us, please?

A He is the defendant.

Q By that you mean --

MR. GORA: Your Honor, I am sorry, we object, of course, to both those questions.

THE COURT: Overruled.

Q By that do you mean James Mitchell?

A I mean the gentleman who is sittin there.

Q The gentleman seated there.

The second half of my question, Miss Hall, was, is the individual who made the assignment of royalties to Porcupine Productions here in court?

MR. GORA: I object, your Honor.

THE COURT: Overruled.

A Yes, Mr. Padgett.

Q Will you point him out, please?

A It's the same person.

Q Will you physically point out the person?

(The witness indicated.)

MR. PADGETT: May the record reflect the witness has indicated the defendant.

THE COURT: It may.

MR. PADGETT: I have no further questions.

THE COURT: Do you have 3500 material?

MR. PADGETT: Yes, your Honor, if I may just have a moment to collect it here.

MR. GORA: I may have been lax in my objection on that last question, your Honor.

THE COURT: I will deem it as having been made and overlooked.

MR. PADGETT: Your Honor, may I just have one further offer.

At this time I would offer as Government's 29 in evidence the check of August 1st in the sum of $1000.

THE COURT: Show it to Mr. Sherr.

Have you furnished Mr. Sherr with the 3500

material?

MR. PADGETT: There is one problem.

At the close of business yesterday I furnished the Court with an original copy of an affidavit, if the Court still has it. I am sorry, your Honor, I think I see it at the witness stand.

THE COURT: Mr. Sherr, will you need some time to look at these?

MR. SHERR: I think just one second.

MR. PADGETT: Your Honor, may what has been received as 26 for identification as well as the original of 29 for identification be received as 3500 material and so marked?

THE COURT: They may be so marked.

(Government's Exhibits 3509 and 3510 were marked for identification.)

xx MR. PADGETT Your Honor, in addition, I think perhaps we should make available to defense counsel that portion of the material submitted to the Court by Mr. Gora on Miss Hall's behalf. I don't know if it would come under the heading of 3500 material.

THE COURT: I agree with you. Let's mark Court's Exhibit 1 as an additional 3500 exhibit.

xx (Government's Exhibit 3511 was marked for

counsel repeating or rephrasing the witness' testimony.

THE COURT: I think he is doing this merely to orient the witness in terms of the time and place and subject matter, and I will allow it.

MR. SHERR: If he wants to refer to the discussion of the day at that place, fine.

THE COURT: I understood that was all he was doing it for.

MR. SHERR: He was about to repeat and rephrase in his own words what his opinion of the conversation was. I don't think that would be proper.

THE COURT: Mr. Padgett, you appreciate the difference.

MR. PADGETT: That was the extent of it.

THE COURT: Go ahead.

Q Do you know whether the young lady, at the time that you saw her in Tommy Small's bar, was a prostitute?

A Yes, she was.

MR. SHERR: Objection, if your Honor please.

THE COURT: This is the Chinese girl?

MR. PADGETT: Yes, sir.

THE COURT: I think he has already testified to that.

MR. PADGETT: He testified, your Honor, that

identification.)

MR. GORA: I have an extra set of those papers that we submitted.

MR. PADGETT: May the record reflect that I have made available 3509, 3510, and 3511 to defense counsel.

THE COURT: Mr. Sherr, I think you might profit from a few minutes here, unless you feel you don't need it.

MR. SHERR: I have no cross-examination of this witness.

THE COURT: All right.

Miss Hall, you may step down.

(Witness excused.)

MR. PADGETT: Your Honor, was there a ruling on the receipt of the check, Exhibit 28 for identification?

THE COURT: Any objection?

MR. SHERR: To what?

THE COURT: I take it you have an objection to Exhibit 28 for identification on the grounds that it's outside the indictment here?

MR. SHERR: Yes, your Honor, unless this is -- is this check intended to -- we have the receipt for the $1000.

THE COURT: Isn't that in evidence through Mr.

Pravda?

MR. PADGETT: No, sir, it was not. The $850 check is in evidence.

THE COURT: I will overrule the objection and admit it in evidence.

MR. PADGETT: Thank you, sir.

(Government's Exhibit 28 was received in evidencd.)

xx MR. SHERR: I believe the receipt that was issued in 1972 which covered the $1000 payment in 1971 is in evidence.

THE COURT: It is.

MR. PADGETT: The Government calls Roosevelt Bell to the stand.

Excuse me, sir, before this witness is called, I wonder if we might have a short bench conference. This would relate to some information which I feel the Court should have, and perhaps defense counsel might wish to share in.

THE COURT: All right.

(At the side bar:)

MR. PADGETT: Your Honor, this witness, Roosevelt Bell, has been the subject of some communications between myself and members of the Department of Justice.

mbs

I would make available to the Court copies of all commuications sent by myself and any other members of the Department of Justice concerning this witness. However, I do note that contained within some of those communications are references to matters other than that which is before the Court at this time.

I would ask the Court to make whatever redaction is necessary. I will make available to defense counsel for cross-examination, of course, not only his criminal record but the redacted copies of these communications.

THE COURT: This is the 3500 material on this witness?

MR. PADGETT: Yes, sir.

THE COURT: All right, at such time as you get to that point, let me look at what it is you want to excise.

(In open court.)

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R O O S E V E L T B E L L , called as a witness by the Government, being first duly sworn, testified as followsl:

DIRECT EXAMINATION

BY MR. PADGETT:

Q Mr. Bell, what is your address?

A Right now I am residing at Lewisburg Penitentiary.

Q How long have you resided at Lewisburg Penitentiary?

A For the last 14 months.

Q When did you first take up residence there?

A June '73.

Q What caused you to take up residence there?

A I got convicted for the Mann Act.

MR. SHERR: I didn't hear that.

THE COURT: Convicted for the Mann Act.

Q What was your occupation before you were so convicted?

A I was a pimp.

Q Can you tell us what a pimp is?

A He is a man that take money from women and lives off the proceeds of prostitutes.

Q How long were you a pimp?

A Maybe for the last 10 or 12 years.

Q Where were you a pimp?

A All over the world, Chicago, Atlanta, Miami, Hawaii, Alaska, Japan, everywhere.

Q Have you ever been convicted of any crimes?

A Convicted of several crimes.

Q Have you ever been arrested for any crimes?

A Yes, sir.

Q Approximately how many occasions have you been arrested?

A I been arrested several times, lot of times.

Q Which is it, several or a lot?

A A lot.

Q What have you been convicted of?

A The Mann Act, assault, death of a person, and pandering and a lot of stuff like that.

MR. SHERR: I am sorry, I can't hear the answer.

THE COURT: I couldn't hear either.

Mr. Bell, you will have to speak a little louder.

A The Mann Act, loitering, assault, pandering, gambling.

MR. SHERR: What was the one before gambling?

THE COURT: Pandering.

THE WITNESS: Pandering.

Q Do you know James Mitchell?

A Yes, I do.

Q Will you point him out, please?

(The witness indicated.)

MR. PADGETT: May the record reflect the witness has indicated the defendant.

THE COURT: It may.

Q How long have you known him?

A About since 1968, about '68.

Q Have you ever had any conversations with him?

A We have talked several times.

Q Can you tell us the general nature of those conversations?

MR. SHERR: I object.

THE COURT: I will sustain the objection to the question in that form.

Q Do you know the defendant by any other names?

A Porky.

Q When did you last see the defendant?

A '73. I think I spoke to him in the -- we was at a dance, and a band was at the Manhattan Center.

Q I direct your attention to 1971. Did you have any particular conversations with the defendant during that year?

A I remember one occasion there was a girl I had --

MR. SHERR: Excuse me, I object. That is not responsive to the question.

Q Just answer yes or no. I take it you either did or did not.

A Well, yes.

THE COURT: All right.

Q Do you remember when that conversation was?

A Yes.

43 Q When was it?

A It was in -- to my -- I can't specify the month, but it was in the cold part of the year, around November, September, some time around that.

Q Where was the conversation?

A It took place in Thomas Small. That's a bar, a bar on 50th and Eighth Avenue.

Q Can you tell us what you said to the defendant and what he said to you?

A Yes, it was about a girl, a girl I used to have named Meko Chan.

Q What was the name?

A Meko Chan, Chinese girl.

THE COURT: Spell that, if you can.

THE WITNESS: M-e-k-o C-h-a-n.

THE COURT: Go ahead.

Q You said it was an oriental girl you used to have?

A Yes.

Q What do you mean by that, sir?

A She used to be a prostitute for me.

Q Continue, please.

A And so we walked -- I walked in the bar and Porky said, the defendant said that he had been looking for me, and I said, "I been looking for you," because I had got the information that he had the girl.

MR. SHERR: Excuse me, your Honor, I object to any information he got.

Q You had learned something; is that correct, sir?

A Yes.

THE COURT: Just what did you say to each other?

THE WITNESS: I told him he owed me some money.

MR. SHERR: Told him what?

THE COURT: "I said he owed me some money."

Go ahead.

Q Why did he owe you some money?

MR. SHERR: I object to that.

THE COURT: No, Mr. Padgett, we are getting the conversation. Let's stay with the conversation.

What did you say to each other in this bar?

THE WITNESS: He said he was looking for me, and I said I had been looking for him. You want me to discuss what we talked about?

THE COURT: Yes.

THE WITNESS: So I told him that he owed me some money, and he said, "For what?"

And I said, "Because you got my woman," you know.

He said, "Well, man, you got to take that up with the bitch," you know.

I said, "Well, man, you owe me."

MR. SHERR: I am sorry, I didn't get that answer.

THE COURT: Mr. Birnbaum, could you read that back as far as it goes?

(The last answer was read.)

THE WITNESS: So he said, "Well, come outside, we will talk about it."

I said, "Nothing to talk about. You owe me."

He says, "Well, what I owe you?"

I said, "Couple of hundred dollars."

So he says, "Well, man, come outside, we will talk about it."

I repeated my statement. I said, "Well, ain't

nothing to talk about," you know.

And I -- we went outside, and we discussed it, and not certain of the amount, but if I am not mistaken, it was around $160, like that.

MR. SHERR: You say you gave him $160?

THE WITNESS: Something like that.

Why did Mr. Mitchell owe you money?

MR. SHERR: Objection.

THE COURT: I will sustain the objection.

MR. PADGETT: Your Honor, may I make an offer of proof?

THE COURT: All right.

(At the side bar:)

THE COURT: Do you want to excuse the witness?

MR. PADGETT: Whichever is easiest.

(The witness left the courtroom.)

MR. PADGETT: Your Honor, the witness has testified that for a period of some 10 to 12 years he was a pimp. There has been testimony which has indicated to the Court that Mr. Mitchell, the defendant, was a pimp.

It is my intention to elicit from this witness that certain conventions existed between pimps concerning the receipt of moneys by these pimps from certain girls.

THE COURT: I had a feeling you were qualifying

him as an expert.

MR. PADGETT: And the particular sum of money owed by Mr. Mitchell to Mr. Bell was the proceeds made by Miss Chan during the the period of three or four days immediately preceding this meeting, the proceeds of actual prostitution made by Miss Chan for three or four days prior to this meeting.

As I understand, the conventions of the profession are that when one pimp has succeeded in adding a young lady to his entourage, and that young lady formerly worked for another pimp, until the original pimp is informed by the successor pimp that the transfer of assets has taken place, all income received by that prostitute belongs not to the successor pimp but to the original pimp; and this is a conversation with arranged that convention of the trade.

MR. SHERR: I have heard about custom and usage in corporate law, Judge, but I never heard of a criminal case where a man is being charged or evidence is offered that by custom and usage it can be presumed that he had performed certain acts.

THE COURT: I think in my discretion I am going to rule it out.

Let me ask you this:

Mr. Padgett, I think the subject matter is

appropriate for your case. I just think to ask him about convention and practice in this trade in which you try to --

MR. PADGETT: This is a specific instance.

THE COURT: I know, it seems to me that if you want to, you may explore further with him as to what was said about how the money was arrived at or something like that, to get at the --

MR. PADGETT: I understand, your Honor, that nothing else was said because, indeed, nothing else had to be said.

MR. SHERR: I think you are stuck with it, Mr. Padgett, because you can't go into what custom and usage of a majority of pimps do.

THE COURT: Yes, I am going to sustain the objection on the grounds of expert testimony on the practices of pimps.

(In open court.)

(The witness returned to the witness stand.)

DIRECT EXAMINATION (Continued)

BY MR. PADGETT:

Q Mr. Bell, you testified that Miss Chan had worked for you as a prostitute?

MR. SHERR: Excuse me, I am going to object to

counsel repeating or rephrasing the witness' testimony.

THE COURT: I think he is doing this merely to orient the witness in terms of the time and place and subject matter, and I will allow it.

MR. SHERR: If he wants to refer to the discussion of the day at that place, fine.

THE COURT: I understood that was all he was doing it for.

MR. SHERR: He was about to repeat and rephrase in his own words what his opinion of the conversation was. I don't think that would be proper.

THE COURT: Mr. Padgett, you appreciate the difference.

MR. PADGETT: That was the extent of it.

THE COURT: Go ahead.

Q Do you know whether the young lady, at the time that you saw her in Tommy Small's bar, was a prostitute?

A Yes, she was.

MR. SHERR: Objection, if your Honor please.

THE COURT: This is the Chinese girl?

MR. PADGETT: Yes, sir.

THE COURT: I think he has already testified to that.

MR. PADGETT: He testified, your Honor, that

prior to that occasion she had been a prostitute in his employ. My question now is, does he know whether she was a prostitute at that particular time.

MR. SHERR: This would call for a conclusion on the part of the witness, particularly with reference to an individual whom the witness concededly no longer had in his employ, so he would have to draw a conclusion by inferences based upon past conduct.

THE COURT: Yes, I will sustain that objection.

Just answer yes or no:

Do you know if Miss Chan was in anyone's employ at that time?

THE WITNESS: Yes.

MR. SHERR: Objection again. This calls for a conclusion.

THE COURT: Yes, strike it out. I sustain the objection.

Q Did you ever have a discussion with anyone concerning Miss Chan's employ at that time?

A Yes.

Q With whom did you have that discussion?

A With the defendant Mitchell.

Q Based upon that discussion, did you form a conclusion with respect --

THE COURT: No, I will sustain the objection.

44 Q What did Mr. Mitchell say, if anything, with respect to Miss Chan's employ?

MR. SHERR: Objection. That has been previously testified to.

THE COURT: Overruled.

A Will you repeat the question, please?

Q What if anything did Mr. Mitchell say with respect to Miss Chan's employ?

A He told me she was his woman, he didn't get her from me.

MR. SHERR: I am sorry. Can I have that answer read?

THE WITNESS: She was his woman and he didn't cop her from me.

Q You used two phrases, his woman, and cop.

At the time that you had this conversation with Mr. Mitchell, did those two phrases have a particular meaning to you?

A They mean the --

MR. SHERR: Objection. What meaning they had to this witness is not important. This witness didn't use those words, the defendant did, so it's the meaning that they had to the defendant that counts. Whatever

interpretation this witness gave or gives to those phrases is not competent.

MR. PADGETT: Your Honor, I submit that two people speaking French, the meaning is plain to each of them.

THE COURT: Yes, I think I will overrule the objection, but I think there should be a foundation laid as to whether that term doesn't mean something specific, and whether he is aware that the words have a specific meaning in this type of discussion.

MR. PADGETT: Very well, sir.

MR. SHERR: I respectfully except.

Q Mr. Bell, you testified you had been a pimp for some 12 years?

A Correct.

Q Are there certain phrases and terms which are common and ordinary terms of usage in the profession of imping?

MR. SHERR: I object to this. Is he qualifying him as an expert?

THE COURT: No, limit if you will to whether that particular word has any meaning in the jargon of that occupation.

Q Does the word "cop" have any particular meaning in the business of pimping and prostitution?

A Yes, it do.

Q Does the phrase "my woman" have a particular meaning in that same business?

A It do.

MR. SHERR: I have to object again, if your Honor please.

THE COURT: Overruled.

MR. SHERR: I would like to add that this is a meaning to this witness.

THE COURT: It's a meaning between pimps, according to his testimony.

MR. SHERR: Is he being qualified as an expert pimp?

THE COURT: I thought he had been.

THE WITNESS: I am.

MR. SHERR: I don't concede his qualifications. The mere fact that he is not a very successful pimp, he's been arrested so many times and in jail, in fact.

MR. PADGETT: Would you like a voir dire?

THE COURT: I will allow it.

Does the term "my woman" have a meaning in this kind of conversation between you?

THE WITNESS: Yes, it do, your Honor.

THE COURT: All right.

Q What does the term "cop" mean?

A It means --

MR. SHERR: Same objection, your Honor.

THE COURT: Yes. Overruled.

A It mean when you get a lady from another man, you cop a lady off or you cop a lady off the streets.

Q Let me just use another phrase.

Cop a lady off the streets, does that have a particular meaning in the pimping business?

MR. SHERR: Same objection.

THE COURT: Overruled.

A Yesj it do.

Q What does the phrase "copy a lady off the streets" mean?

MR. SHERR: Same objection.

THE COURT: I am going to sustain that objection, Mr. Padgett. The conversation was, "He copped her from me and she was my woman."

Let's just stick with that conversation.

MR. PADGETT: Very well, sir.

THE COURT: He has testified now that each of those phrases has a specific meaning. Why don't you ask him what they mean?

Q What, within the context of that conversation,

within the context of the profession, do those two phrases mean?

A When you cop a lady, that means she's working for you and she is your woman.

Q What does the phrase "my woman" mean?

A Means she is working for me, giving me money.

Q In 1971 did you ever see Mr. Mitchell in conversation with any individuals?

A You mean ladies or mens?

Q Women.

A Yes, I have.

Q Mr. Bell, I show you items which have been received as Government's Exhibits 16 through 24 for identification.

Do you recognize any of the individuals thereon?

A Yes, I recognize them.

Q Will you show us which photos you recognize?

A These girls here.

Q You have shown us Government's Exhibit 21 for identification, which has a photo of two young ladies on it. Do you recognize these two young ladies?

A That's Ina and Nancy.

Q Ina and Nancy?

A Yes, twins, right.

Q Do you recognize any other individuals in these photos?

THE COURT: Did you identify the phot by number for the record?

MR. PADGETT: Yes, 21 for identification, your Hono.

MR. SHERR: May I see that photo?

THE COURT: You may.

(Photograph handed to Mr. Sherr.)

Q You have picked out No. 16 for identification. Do you recognize the individuals thereon?

A Yes.

Q Who is the young lady?

A Sandy.

Q Sandy?

A Yes.

Q Who is the gentleman to her left?

A That's Mitchell.

Q Mitchell, the defendant?

A Yes, sir.

MR. SHERR: If your Honor please, I have to object to the line of questioning, whether or not this witness recognizes pictures of individuals in exhibits marked for identification, I see no bearing or relevance

to the issues in this case.

THE COURT: I will allow it.

Overruled.

MR. SHERR: Respectfully except.

A I have seen this young lady several times, but I don't know her name.

Q Will you repeat that, please, so everyone can hear you?

A I have seen the young lady --

Q Speak up.

A I have seen the young lady with the defendant several times, but I don't know her name.

Q You are referring to the young lady in Exhibit 24 for identification?

A Yes.

Q Any of the other photos, sir?

A Also this young lady.

Q Do you know her name?

A No.

Q You are referring to the individual in 17 for identification?

A Yes.

Q Any of the other photos?

A Just the twin.

Q You have shown us the young lady in Exhibit 20 for identification. You say that is one of the twins?

A Right.

Q You do not recognize anyone in 19 for identification, 18 for identification, do you recognize either of the people there?

A I really can't get a look at her face.

Q How about the male?

A Oh, that's the defendant.

Q That is the defendant?

A Yes.

Q And in Exhibit 22 for identification, the male?

A Mitchell, Mitchell.

Q And in Exhibit 23 for identification, the male?

A Is also Mitchell.

Q You recognize this yound lady by name, did you not, the young lady in Exhibit 16, and what is her name?

A Sandy.

Q Did you ever see the defendant in conversation with Sandy?

A I was walking on Lexington one night --

Q Just yes or no, sir.

A Yes.

Q What year was that, sir?

A Last part of '72 or first part of '73, somewhere around there.

Q What did you see?

A I saw the defendant speak to her. She gave him something. I don't know what, but she gave it to him.

MR. SHERR: Your Honor, I hate to get up every time, but if we are going to have evidence about who this man saw on the street with this defendant in '72 and what happened in '72, really I don't see --

THE COURT: The only purpose that I can see for that coming in here is some corroboration of the fact that he knew that particular girl, and nothing more.

MR. SHERR: What difference does it make whether he knew the girl or not?

THE COURT: It may well be connected up with other proof in the case.

MR. SHERR: There has been no connection so far. There is no claim that he received any money from this other girl.

THE COURT: I will allow the answer to stand.

MR. SHERR: Respectfully except.

Q Mr. Bell, you have testified about specific phrases having specific meanings within the context of pimping and prostitution, correct?

A Right.

Q Within that context, does the phrase "flatbacker" have a particular meaning?

MR. SHERR: I object to that. There is no --

MR. PADGETT: It will be connected.

MR. SHERR: There is no testimony that the defendant or anybody involved with this case used this phrase, what the meaning of this phrase is. There is no relevance here.

MR. PADGETT: It will be shown.

THE COURT: I will take it on the Government's representation it will be connected. I will allow it.

MR. SHERR: Respectfully except.

THE WITNESS: Repeat the question.

Q Within the context of prostitution and pimping, does the phrase "flatbacker" have a particular meaning?

A Yes, it do.

Q What is that meaning?

A It means a girl that strictly turns tricks.

Q You will have to explain it for us.

A Well, flatbacker is a lady what sell her body, just sell her body and don't do no robbing, and she don't play no kind of con game. She just only turn tricks for money.

Q Did you ever have a conversation with the defendant when that phrase was used by the defendant?

A Yes, I have heard him mention that.

Q When was this, sir?

A In a barber shop.

Q When, sir?

A About '72 or "73 but I can't be sure.

Q What did the defendant say?

MR. SHERR: Objection, if your honor please.

THE COURT: I will allow it.

MR. SHERR: Respectfully except.

Q What did the defendant say?

A He said he had flatbackers, can't get that much money. He was talking about some money. We was talking about something, so he mentioned something, he answered like, "I got flatbackers give me that much money."

Q How much money was the sum in question?

MR. SHERR: Objection.

THE COURT: Overruled.

Q You may answer.

A He was talking about in the 70 and 80,000 dollars.

MR. PADGETT: No further questions.

MR. SHERR: If your Honor please, I realize there

is no jury present, but however, all this evidence of 1972 to 1973 that your Honor is permitting in subject to connection, if it is not connected, can't help but prejudice your Honor. There is testimony here of incidents, 75 per cent of the testimony that has been offered here so far relates to incidents in '72 and -- mostly in '72. They are trying to establish a pattern of guilt in '71 by virtue of what happened in '72, and I don't think it's proper.

If the man committed a bank robbery in 1972, that would be no proof that he committed a bank robbery in '71, and I realize that your Honor is sitting without a jury and that your Honor is keeping an open mine on this, but I don't see how your Honor in h is subconscience cannot be prejudice, cannot be affected by all this testimony.

THE COURT: I think this proof is legally admissible on the issues of the indictment, and I will allow it.

MR. SHERR: I respectfully except, your Honor, because if a man -- let us assume for the sake of argument a man committed a crime in November of 1972. Does that make him guilty or any evidence that he was guilty of another crime in '71?

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THE COURT: I overrule the objection.

Go ahead.

MR. SHERR: Respectfully except.

MR. PADGETT: Your Honor, I have no further questions.

There is a somewhat large amount of 3500 material that we may have to go through and which was discussed.

THE COURT: All right.

Mr. Bell, we will excuse you. We are going to take a recess for a few minutes. Counsel will stay, because you have some problems with this 3500 material.

MR. PADGETT: Yes, sir.

THE COURT: So we will excuse you for a few minutes.

(The witness left the courtroom.)

MR. PADGETT: Your Honor, would you prefer this material in open --

THE COURT: Let me see what it is and what you want out.

MR. PADGETT: I would show to the Court a letter written by myself on November 1, 1973 together with certain attachments thereto.

THE COURT: Have you marked what you want excised?

(Discussion off the record.)

(Recess.)

(In the robing room:)

THE COURT: For the record, Government's Exhibit 3512 is the original grand jury minutes of Roosevelt Bell.

Exhibit 3512-A is a redacted copy with materials removed which have nothing to do with the witness' testimony, which I have looked at myself pursuant to 3500, Subdivision C.

I turn over to counsel therefor the redacted copy of the grand jury testimony of Roosevelt Bell.

MR. SHERR: Your Honor, you will have to excuse me. you used a word, I don't know what it means.

THE COURT: Redacted, which is a word in the Federal Court which means there are pieces chopped out.

(Government's Exhibits 3513 and 3514 were marked fof identification.)

xx THE COURT: 3514, Mr. Padgett, you are prepared, I take it from hearsay that I got from various sources, you are prepared to show this to defense counsel on the theory that they will look at it in its entirety, and to the extent that it does not bear on anything the man said, they will honor your concern about the use of the materials that you have bracketed in red? Is that what I understand?

MR. PADGET: Not only the bracketed paragraphs, sir, but also the letters which are annexed.

THE COURT: Yes.

MR. PADGETT: That is my understanding. I would, however, like counsel to agree to that on the record.

MR. SHERR: I can't make any statement. I don't know what's in there. I can't agree not to use anything.

THE COURT: Mr. Sherr, let me just say Mr. Padgett has given me Exhibit 3513 as being something that you are entitled to see. He has marked in red two paragraphs on the first page and refers to those two paragraphs and letters that are annexed with the statement, that he feels those have to do with the man's continued undercover work, and therefore, to the extent that you do not deem it necessary in your cross-examination, he would appreciate your respecting the man's cover and not needlessly destroying it.

MR. SHERR: I am not looking to destroy his cover, but I have to attack his credibility.

THE COURT: Without any question you do, and with the understanding that what has been told you in this regard, I think it should be turned over to you in its entirety, and that is being done.

The same is true as to Exhibit 3514 in which Mr. Padgett has marked a part of a paragraph bracketed in red as to which he has the same concern that there not be a needless destruction of the man's cover, apparently, in certain areas of his work.

MR. PADGETT: Your Honor, may we mark as Exhibit 3515 a copy of an affidavit given by Mr. Bell to agents of the Internal Revenue Service?

THE COURT: By all means.

MR. SHERR: Am I to get 3512, the grand jury minutes?

THE COURT: No, those are the originals. Those will be preserved in the event there is ever any claim that you did not get grand jury minutes -- that there was ever a contention that the redacted --

MR. SHERR: 3512-A, the copy?

THE COURT: 3512-A is the redacted copy.

MR. SHERR: All right.

MR. PADGETT: 3516 is a copy of Mr. Bell's arrest record, which has been made available to counsel and will of course continue to be made available to them.

(Government's Exhibit 3516 was marked for identification.)

xx

MR. PADGETT: Exhibit 3517 is an order of the United States District Court for the Eastern District of Louisiana dated June 11, 1974 and a cover letter from Betty Robinson, Secretary to Judge Lansing P. Mitchell, a judge of that court dated the 18th of June 1974.

(Government's Exhibit 3517 was marked for identification.)

XX

MR. PADGETT: Your Honor, perhaps it is appropriate for me to explain at this state on the record that what I am offering as 3500 material, the order of the District Court of Louisiana as well as a letter from the judge's secretary to me, I am adding a letter from me to Assistant United States Attorney Stephen Mayo, which has been designated 3513, and in so revealing, I would reveal to the Court the extent of the Government's agreement with Mr. Bell, which may indeed have influenced or at least have motivated him to testify here, and of course it's something for exploration by defense counsel on cross.

The Government agreed to make known to the United States District Court for the Eastern District of Louisiana the extent of Mr. Bell's assistance to the Government in this and in other cases.

The Government also agreed to make known to the United States Parole Board the extent of Mr. Bell's

assistance to the Government in this and in other cases.

My letter to Mr. Mayo outlines Mr. Bell's assistance up to the date of that letter, November 1, 1973.

I must also state to the Court that I have been in conversation with Judge Mitchell, and he was the sentencing judge who sentenced Mr. Bell to five years in Federal Prison in June of 1973 for violation o the Mann Act, and I have indicated to Judge Mitchell in the spring of 1974 the extent of Mr. Bell's cooperation to that point.

Judge Mitchell modified Mr. Bell's sentence. That modification is expressed in the order of June 11, 1974 which has been received as Exhibit 3517 here. Therefore, I communicated with the United States Parole Board.

I might state for the record that the effect of the modification of the order was to make Mr. Bell eligible for parole upon consideration by the Parole Board assuming that Mr. Bell met the criteria established by the Parole Board.

I therefore, on today's date, following a telephone conversation with the legal staff of the Parole Board last week or the week before -- in any event, today I wrote a letter to Mr. Maurice Signer, Chairman of the Parole Board, and this letter has been received as Exhibit

3514 again outlining Mr. Bell's cooperation and assistance to the Government in this and in other cases, and I am bringing that material to the attention of the Parole Board.

That has been the extent of the Government's efforts on behalf of Mr. Bell, and I think the various letters which I have written speak for themselves.

MR. SHERR: There has also been a request, since I read part of the italicized part by the Police Department, to have him released so he can work undercover.

MR. PADGETT: You know, sir, that request was not honored.

MR. SHERR: I know that you rejected it.

MR. PADGETT: I made no such request, and indeed I noted in my last paragraph of my letter to Mr. Mayo, letter of November 1st, that I could not concur with that.

MR. SHERR: My problem with that, Judge, is if he is aware, and he has had conversations with the police authorities, that if he plays ball with them and gives them names and cooperates, that they are going to work to try to get him released.

I appreciate Mr. Padgett's problem, and I don't want to blow his cover but --

THE COURT: You do what you feel is appropriate to represent your client. That is all I can say.

MR. SHERR: I am almost prepared, in view of the nature of this man's record and the nature of the fact that there is no jury here, to stipulate as to the facts of this man's background and his motivation and purposes in so far as they affect his credibility so as to avoid the exposure here.

Since we are trying this before your Honor, I would like that these letters with offers of reduction of the five-year sentence to -- what happened to that five-year sentence?

MR. PADGETT: The five-year sentence, of course, remains in effect. The order of the Court of June 11 merely makes Mr. Bell eligible for parole upon consideration by the Parole Board. He has not been so considered by the Parole Bcard, nor do I know if ever he will be so considered.

THE COURT: They gave him an A sentence in effect.

MR. PADGETT: yes, sir.

MR. SHERR: The witness has received offers of consideration for cooperation. He has been led to expect that he would be given favorable consideration with reference ro parole.

MR. PADGETT: No, he has not been led to that

at all. There is no statement whatsoever in any of those materials which would state that he would be favorably considered. That is just not a fair statement.

MR. WERNER: He has been made eligible for it.

MR. PADGETT: He has been elivible for it, correct.

MR. SHERR: You are writing letters to the Judge in New Orleans advising him of his cooperation, right?

MR. PADGETT: Obviously. I think what you are saying is that certain efforts were made on behalf of M.r Bell, and that these efforts may have had some inducement, may have caused Him to testify in a certain manner. That is entirely possible.

What my personal opinion on it is I am not going to venture, but I am sure his Honor is sophisticated enough to take that intoconsideration in evaluating the witness' testimony. If you are prepared to stipulate that the 3500 material as received in toto and made part of the record were the Government's efforts on behalf of Mr. Bell, I am prepared to so stipulate.

I am prepared also to stipulate that nothing further, nothing other than that which has been revealed has been done by myself or any other agents of the Federal Government.

MR. SHERR: And you stipulate Mr. Bell is aware of the Government's efforts in his behalf?

MR. PADGETT: Yes, he is.

MR. SHERR: And he has testified in previous cases and has agreed to testify in other cases?

MR. PADGETT: That's correct, sir.

MR. SHERR: There is only one other thing that concerns me here, Judge. Looking at his yellow sheet, I had spent an hour and a half just going down. There are about 50 or 60 arrests. I don't see how he had time to be a pimp. He wasn't on the street long enough. He was arrested on the average of nine or ten times a year, and every once in a while he'd have a month out.

MR. PADGETT: No, he spent very little time in jail, if you notice.

MR. SHERR: Maybe you have more experience with these yellow sheets than I have, but it's a lulu as far as I am concerned.

MR. PADGETT: It shows a very large number of arrests and a very small number of convictions that resulted in time in jail.

MR. SHERR: No, what you have here unfortunately, they don't give the dispositions in many of these situations, but if you look at '65, '66, '67, '68 he has --

MR. PADGETT: Mr. Sherr, I have no objection to the Court examining the yellow sheet or examining all the 3500 material. I have no objection to that whatsoever.

MR. SHERR: In 1965, the year he was supposed to have met my man and claimed that he took away a girl, he was arrested in June, in June, in July, and in August.

When he had the other conversation in '72 -- the sheet speaks for itself. I think that I would be prepared to rest on the question of credibility of this witness, because I would spend five hours with him, Judge, and it would boil down to the fact that he's got something to gain by testifying. He is hoping for favorable consideration with reference to his present confinement. He has testified with reference to other cases, he has testified with reference to -- he plans to testify with reference to still further. I don't want to get into this, but he has offered to work undercover. I think the question of credibility based upon his record is one that, by the 3500 material, is sufficiently questionable.

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THE COURT: Then you would authorize me, in considering the issue of credibility of this witness, to consider 3512-A through --

MR. SHERR: All of it, your Honor. I will

let you look at everything he said, because I personally feel that this type of testimony is --

MR. PADGETT: I would have no objection to your Honor examining all 3500 material and weighing it and giving it whatever merit or weight your Honor considers.

THE COURT: All right.

MR. SHERR: I would like if possible one concession, which is one point -- I don't know if I can. he identified the girl in the picture with the defendant as Sandy. The only time that name Sandy is used is in the book. All the names in the book are pseudonyms.

MR. PADGETT: There has been no testimony to that effect.

MR. SHERR: Yes, when you asked him to identify the picture, I think it was No. 16.

MR. PADGETT: There has been no testimony that the names in the book are pseudonyms.

MR. SHERR: Yes, there was.

THE COURT: There hasn't been any testimony. The book isn't in evidence.

MR. PADGETT: There has been no testimony.

MR. SHERR: I believe you asked the question.

THE COURT: No. I referred to the book in connection with Miss Hall's claim of journalistic privilege,

and only for the limited purpose of showing that from the book itself you could conclude that there was no real intent that these people be protected from disclosure. That was the only purpose.

MR. SHERR: I can't place it but --

THE COURT: No, I mentioned it from the bench. I read from the book.

MR. SHERR: I would bet $20,000 that somewhere during this trial it was said that all the names in the book are pseudonyms.

THE COURT: Mr. Sherr, I read from the author's preface to the Book where that was stated.

MR. SHERR: That they are pseudonyms.

THE COURT: I read that for the limited purpose of overruling the witness' claim of privilege.

MR. SHERR: The point I wanted to make is that the pseudonym Sandy --

THE COURT: As far as I am concerned, that book isn't in evidence.

MR. SHERR: -- was the name he used to identify this girl. She was never known by that name.

THE COURT: All right.

MR. SHERR: I am not going to call him for that purpose. I am prepare, in view of the consideration of the

Government, I don't want to -- I appreciate the Government's problems, and I would be forced possibly to go into areas which might endanger the Government's cases in other matters. I am perfectly satisfied to submit all the 3500 material to your Honor to consider on the question of credibility of the position the defendant is taking, that we are challenging his credibility based upon his record and based upon the fact that he has been previously granted consideration, and he expects further consideration for his testimony.

THE COURT: Will you have any cross-examination?

MR. SHERR: Under those circumstances, I can spend five hours on him, Judge. There is no point in it. If there was a jury, I would have to do it, but with your Honor, and we agree that your Honor is going to review this material, provided your Honor will review that material, I am perfectly willing to rest on your Honor's decision as to credibility of this witness after ruling --

THE COURT: Then you will excuse this witness?

MR. PADGETT: Yes, sir, I have no further questions of this witness.

THE COURT: Mr. Sherr, you don't want to ask him any questions?

MR. SHERR: No. We have it on the record with

respect to this stipulation that --

THE COURT: Yes. We will take a short recess for about five minutes, and then you have just a little bit more proof?

MR. PADGETT: If I could just outline it, I have gone over what I have left today. There is a witness that will testify to a conversation between himself and the defendant, a police officer. There are then two mechanical witnesses, that is to say, the special agent, Mr. Clarke, who will testify as to a conversation between him and the defendant on one occasion; and then the real mechanic, the revenue agent who will testify as to the computations performed based upon the information submitted to him by Special Agent Clarke.

I don't know counsel's cross-examination, obviously, but it appears to me that it's fairly mechanical.

THE COURT: We will go till 5 o'clock.

How much of a defendant's case do you have in mind to put on?

MR. SHERR: I would rather comment at this point.

THE COURT: All right.

MR. PADGETT: Can I go off the record?

(Discussion off the record.)

(Recess.)

(In open court.)

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RICHARD JAMES JOHNSON, called as a witness by the Government, being first duly sworn, testified as follows:

THE WITNESS: Police Officer Richard James Johnson, Shield No. 27360, Public Morals Division, Organized Crime Control Bureau.

DIRECT EXAMINATION

BY MR. PADGETT:

Q Officer Johnson, how long have you been a police officer?

A Approximately six years.

Q During that period of time, can you tell us briefly what your assignments have been?

A For the last three years I have been assigned to the Public Morals Division, Obscenity Control Unit, Pimp Squad.

Q Will you tell us briefly what your duties are as a member of the Pimp Squad?

A To gather information and intelligence on the persons in the street known to the Police Department as pimps.

Q During the course of your duties as a member of the Pimp Squad, do you have occasion to have conversations with certain individuals?

A Yes, I do.

Q Have you ever had conversations with prostitutes?

A Yes, I have.

Q Have you ever had conversations with pimps?

A Yes.

Q Approximately how many conversations over the last three years have you had with prostitutes?

A 300.

Q Approximately how many conversations have you had with various pimps?

A Could be close to 200.

Q Are there various phrases and terms which are used in the business of prostitution or pimping?

A Yes, sir.

Q Are you familiar with those phrases?

A Yes, sir.

Q Do you know James Mitchell?

A Yes, I do.

Q Do you see him here in court?

A Yes, I do.

Q Would you identify him, please?

A He is the gentleman sitting with the brown jacket on to the far right of the defense counsel.

MR. PADGETT: May the record reflect the witness has identified the defendant?

THE COURT: It may.

Q Did you ever have occasion to engage Mr. Mitchell in conversation?

A Yes, I did.

Q Do you remember any specific conversations?

A I had asked Mr. Mitchell --

MR. SHERR: Excuse me, that calls for a yes or no answer.

THE COURT: I take it the answer is yes.

When was this?

THE WITNESS: It was November 22, 1972, your Honor.

Q Can you tell us what he said to you and what you said to him?

MR. SHERR: May I have an objection, first, on the ground this occurred in November of 1972, unless it's connected to some event in '71, and further, may we have the location where this conversation is alleged to have taken place?

THE COURT: Officer, state the location, and I will

take the testimony subject to striking.

Officer, where was this?

THE WITNESS: It was in the confines -- within the prcinct of the 9the Precinct Station House.

THE COURT: What did he say to you, and what did you say to him?

THE WITNESS: I tried to establish an identity after quite considerable amount of my questioning, which I always do when I meet a pimp.

THE COURT: Just tell us --

THE WITNESS: He identified himself to me as Porky, and a person who was driving the car that he was in, which was the reasonwhy he was in the 9th Precinct, called him by that name, and I again referred to him, and he did admit to being that, and the name of Silky.

THE COURT: What was that, and --

THE WITNESS: And Silky, S-i-l-k-y.

Q Did Mr. Mitchell say anything to you?

A Yes, he did.

48 Q What did you say to him, and what did he say to you?

A I asked him what he does.

Q What did he say?

MR. SHER: Excuse me just a moment. I think

we should establish the circumstances under which he was in the precinct house, and if he was in the precinct house under arrest, if there were no admonitions made to this defendant with respect to the arrest or anything that might be said, that anything that he might say might be used against him, that any such discussion is not proper evidence.

MR. PADGETT: Your Honor, that is a perfectly appropriate motion to strike upon cross-examination. It's not my burden to show that any warnings were made or that the defendant was or was not under arrest.

MR. SHERR: It's not proper evidence.

MR. PADGETT: If counsel wishes to strike upon cross-examination, he certainly may.

THE COURT: I am not so sure.

MR. PADGETT: If your Honor desires, I can explore the subject.

THE COURT: I think you should.

Q Was the defendant under arrest at the time you had this conversation?

A No, sir.

Q Was he suspected of the commission of any crime?

A No, sir.

Q What did he say to you, and what did you say to him?

THE COURT: That doesn't go far enough.

Officer, tell us how he happened to be in the station house.

THE WITNESS: I was at my office, and my superior officer received a phone call from the 9th Precinct that there is a person that resembles the picture of a person in New York Magazine, an article. They suspected him as being one and the same, that is, a pimp, and they called the Pimp Squad, and my superior officer assigned me to go to the precinct to interview the person, to see if it was in fact the same person.

I got to the precinct. The captain of the 9th Precinct handed me the magazine. I looked at it, looked at Mr. Mitchell, and they were in fact one and the same person.

I walked over to Mr. Mitchell, identified myself, told him where I am from, and we had a conversation.

THE COURT: Had anybody given him any warning as to his rights?

THE WITNESS: From what I understand from the police officer who was handling the case, Mr. Mitchell was --

MR. SHERR: Excuse me. I object to from what he understands from somebody else unless he --

THE WITNESS: What I was told.

THE COURT: Also at that time was Mr. Mitchell free to leave the precinct house if he wanted to?

THE WITNESS: After being questioned by the police officers, yes.

THE COURT: At the time that you were talking to him, if he just said, "I don't want to talk to you" and walked out, was he free to walk out?

THE WITNESS: The police officer who had caused him to be in the station house was conducting an investigation over the events leading to him be there, that per se he went through a red light. The driver of the automobile was not Mr. Mitchell. He was a passenger.

THE COURT: Mr. Mitchell was with the driver?

THE WITNESS: Yes, sir, and the officer wanted to satisfy himself as to everybody's identity in the car because of something that was wrong with that automobile.

THE COURT: You may have a point.

Is it your understanding, Officer, that the customary warning against self-incrimination had been given to Mr. Mitchell earlier by another officer? Is that what you concluded when you arrived?

THE WITNESS: Yes, sir. I asked Mr. Mitchell myself, "Would you mind if we had a talk? I am a police

officer and I'd like to talk to you about this picture, this particular article."

THE COURT: Yes, but did anybody say to Mr. Mitchell at any time that he had the right not to answer any question which might tend to incriminate him?

THE WITNESS: Yes, I said if he doesnt want to talk to me, he doesn't have to talk to me, if he doesn't want it.

MR. SHERR: I submit to your Honor that that language is not sufficient.

THE COURT: Did you use in there that he had a right not to incriminate, give any answer to any question which might tend to incriminate him?

THE WITNESS: No, your Honor, I don't recall saying those -- that phrase.

MR. PADGETT: Your Honor, if I can be permitted two questions, which are not crucial questions, just exploratory ones, I think I can settle it.

Q Officer, you are familiar with the giving of rights, were you not?

A Yes, sir.

Q Were you present when Mr. Mitchell was given rights?

A No, sir.

Q Did you advise him of his rights?

A No, sir.

MR. SHERR: I object.

MR. PADGETT: If your Honor is inclined to sustain counsel's objection, I will have no further questions.

I will withdraw the witness at this time, and I have no objection to a motion to strike.

THE COURT: All right, I will grant it.

The witness is withdrawn.

MR. SHERR: I renew my objection and move to strike.

MR. PADGETT: No objection.

(Witness excused.)

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JOHN P. CLARKE, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PADGETT:

Q Mr. Clarke, what is your occupation?

A I am a special agent with the Internal Revenue Service, the Intelligence Division.

Q For how long have you been so employed?

A Five years, a little more than five years.

Q During these five years, what has been your specific assignment?

A Investigating criminal violations of the Internal Revenue laws.

Q How many such investigations have you performed?

A Oh, a total of approximately 40, 45.

Q How many of these were as a participating agent?

A Roughly 15.

Q How many of these were as a supervising agent?

A Roughly 30.

Q Did there come a time during the course of your official duties when you were assigned the case of James Mitchell?

A Yes, sir.

Q When was that, sir?

A April of 1973.

Q In what capacity were you so assigned?

A I was the supervising agent.

Q What were your duties as the supervising agent?

A I would cause or direct other agents to follow all leads available to us concerning any financial transactions of the taxpayer.

Q Specifically, what financial leads were followed at your direction?

A We checked all Government sources available to us regarding Mr. Mitchell, in particular Surrogate Court records for inheritances, grantee-grantor records here in New York and his birthplace; bank records in the vicinity of his name in his name and in aliases known to us; records of various automobile agencies that we had information that he may have purchased the vehicles from.

49 Q Did you conduct any interviews?

A Yes, sir.

Q Did agents under your direction conduct interviews?

A Yes, sir.

Q Were these the interviews of Susan Hall and Nancy Sauer?

A Yes, sir.

Q Which banks did you cause to be checked, sir?

A Banks in particular were checked in the area of the residence, 145 Fourth Avenue, and the surrounding area, and banks in his birthplace.

Q Where was that, sir?

A Cleveland, Ohio.

Q When you say banks were checked, what particular names were searched?

A We used his known name to us was James Mitchell, Charles Dunbar, and I am not sure if we checked other names. I can't at this time recall.

Q What were the results of your search of your Surrogate records?

A There were no records pertaining to James Mitchell or Charles Dunbar.

Q In which counties did you search?

A All the counties in the New York area.

Q Counties of any other state?

A Cleveland, Ohio.

Q What was the result of your search of the grantor-grantee indexes?

A No record regarding a James Mitchell or Charles Dunbar.

Q Which counties did you search?

A All the counties in New York and also the area of Cleveland, Ohio.

Q What were the results of your search of the banks of New York and Cleveland, Ohio?

A We uncovered one account in the name Dundar in Central Savings Bank in the vicinity of 145 Fourth Avenue, I believe.

Q Did you uncover any accounts in the name of James Mitchell?

A Not to my knowledge, sir.

Q Do you know of any other agents working under your control who uncovered such an account?

A Possibly. At this point I'd have to look the records up.

Q I direct your attention to September 27, 1973. Did something happen on that date?

A Yes, sir.

Q Tell us what happened.

A Myself and my partner, Special Agent Robert Seal, received information that a girl --

MR. SHERR: Excuse me.

Q Don't tell us what information you received.

MR. SHERR: I object to that.

THE COURT: Strike it out.

Q Did you receive certain information?

A Yes, we did.

Q Did you act upon that?

A Yes, we did.

Q What did you do?

A We went to a hotel called the --

MR. SHERR: Excuse me. I have to object. September 1973, now we are getting even further afield.

THE COURT: Let's see what comes.

Go ahead.

Q Continue.

A We went to the Ramada Inn located on the west side of New York, a hotel, for the purpose of serving a subpoena on a female known to us as Janet Milanczak.

Q Was that in connection with this case?

A Yes, sir.

Q Agent Clarke, I show you Government's Exhibit 17 for identification.

Do you recognize the photo?

A Yes, I do.

Q Who is that individual?

A Janet Milanczak.

Q Continue, please.

A We knocked on the door, and this white female opened the door known to us as Janet Milanczak, and I identified myself and told her that I wished to speak with her.

MR. SHERR: Excuse me, I have to object to any conversation he had with a third party.

THE COURT: Yes, I would think so.

MR. PADGETT: He can say what he said.

THE COURT: What?

MR. PADGETT: Certainly he can say what he said. I don't propose to extract from this witness what was said to him not in the presence of the defendant.

THE COURT: You identified yourself?

THE WITNESS: Yes.

THE COURT: Then what happened?

THE WITNESS: The girl closed the door, and then Mr. Mitchell came to the door, and I identified myself again. Mr. Mitchell allowed us to enter, and we told Mr. Mitchell at that time --

Q When you say "we," were you with anyone?

A Myself and Agent Seal.

Q Continue.

A Then we identified ourselves and we were not here

to talk with him at all, we wanted to serve a subpoena on the young lady. And Seal proceeded to write up the subpoena for the young lady.

I in turn turned to Mr. Mitchell and told -- I told him that I wanted to talk to him about something, that he did not have to talk to me, that I knew he had an attorney, and that I hoped he understood that, that he could tell me to get the hell out of there, that anything that he did say to me -- he kept saying, "Yes, I understand"; and I said, "I hope you know that you don't have to say anything to me, because I know you have an attorney."

He said, "Yes."

I said, "Anything you say in the conversation can be used against you."

"Yes."

I said, "You can still tell me to get out."

"Yes."

I said, "Okay, I am just curious. I just wanted to know. I can't locate your tax returns in New York."

He responded by --

MR. SHERR: I am going to have to object, if it please your Honor, to any response. I respectfully submit that the admonition as testified to is not sufficient to satisfy the requirements.

THE COURT: I want to look at some of the cases when we recess tonight, but this is not a situation where the man was conceivably under arrest or in the station house. This is a conversation in the doorway. I don't know that --

MR. SHERR: He is in his apartment.

THE COURT: Well, the lobby of the apartment, but I don't know that there was any arrest situation in existence here that even required the admonition to be given.

MR. SHERR: If I understand correctly, this was a subpoena in this case.

THE COURT: To the girl, not to him.

MR. SHERR: So there was already an indictment or a charge pending if there was a subpoena issued.

MR. PADGETT: There was no indictment or charge pending at that time, as counsel is well aware.

MR. SHERR: There was a subpoena for a grand jury.

THE COURT: I will overrule the objection.

MR. SHERR: Respectfully except.

Q Continue, please.

A I will have to repeat myself to get back into the sequence.

THE COURT: You had said you couldn't find a copy of his return.

A I said I could not find a copy of his tax returns in New York, and he responded -- Mitchell responded, "I am from Ohio."

I said, "Oh, then you filed In Ohio."

He said, "No, I filed my returns in New York."

And I said, "Thank you very much."

Q Mr. Clarke, did you make certain information available to any agents in the Internal Revenue Service?

A Yes, I did, sir.

Q Specifically, did You make available to agents in the Internal Revenue Service information concerning the receipt of moneys --

MR. SHERR: I have to object to this as leading.

THE COURT: I think he is laying a foundation for the tax confrontation based upon a --

MR. SHERR: Why doesn't he just ask what information he made available.

MR. PADGETT: We have been on trial two days for that information.

MR. SHERR: All right, I withdraw it.

Go ahead.

Q Did you make available information concerning

certain moneys received by Mr. Mitchell during 1971?

A Yes, sir.

Q Was that information received from Susan Hall?

A Yes, sir.

Q Was that information that you had received from Nancy Sauer?

A Yes, sir.

Q Do you know if a certain series of computations were made by a revent agent based upon that and other information?

A Yes.

Q Did indeed you make available to the revenue agent all the information pertaining to Mr. Mitchell's financial background?

A Yes, I did.

Q Can you give us the name of that revenue agent?

A Edward Montenegro.

Q Did Miss Milanczak ever appear in the grand jury?

A No, she didn't.

MR. SHERR: I couldn't hear. What was the question?

Q Did Miss Milanczak ever appear in the grand jury?

A No, she didn't.

MR. PADGETT: At this time, your Honor, I would

offer into evidence as Government's Exhibit 17 the ph ot previously received as 17 for identification.

50 MR. SHERR: A photo of what?

May I see it?

(Photograph handed to Mr. Sherr.

MR. SHERR: For what purpose, may I ask, is it being offered in evidence?

MR. PADGETT: No, you may not ask me. You may ask the Court to ask me that, but you can't ask me.

MR. SHERR: I object to that. There has been no relevancy of this exhibit to any of the issues in this case.

THE COURT: Was this one of the ones that was identified by Miss Sauer as one of the girls with whom she worked?

MR. PADGETT: Yes. I don't think she used that phrase.

MR. SHERR: She never used that phrase. She just said she knew some of these girls.

THE COURT: Was in the apartment with Mr. --

MR. SHERR: No, just she knew some of these girls.

MR. PADGETT: No, she never said that. She identified photographs of a series of individuals, Govern-

ment's Exhibits 16 through 24 for identification, as did Mr. Bell identify some of those photographs.

I would ask the Court to --

THE COURT: Yes, but in what context did she identify them?

MR. SHERR: That she knew them.

MR. PADGETT: That she knew them as individuals. She identified them in no other context.

MR. SHERR: Just that she knew of them. There was no other context.

THE COURT: Wasn't there one girl that she met the very first night?

MR. PADGETT: Yes, sir.

MR. SHERR: That is her sister.

MR. PADGETT: No, that was the young lady identified as Sandy. That would be Government's Exhibit 16 for identification.

THE COURT: I see. That is not the one you are talking about?

MR. PADGETT: That is not the one we are talking of.

THE COURT: I stand corrected then.

How does this become --

MR. PADGETT: In that event, your Honor, I

would offer into evidence as Government's Exhibit 27 and as Government's Exhibit 25 the hard and soft bound volumes previously received as 27 and 25 respectively for identification.

MR. SHERR: Objection.

MR. PADGETT: And each of the photos I would ask the Court to take notice that these are reproductions of photos contained in those books.

I point out to the Court that one of the witnesses has identified the photo of the defendant on the cover of each of those, has identified photos of the defendant in the company with several of the young ladies. Indeed, the defendant is pictured on several of these photos.

The book itself identifies the subject of the photos as Silky -- no, I will withdraw that last statement.

THE COURT: You have problems with those books on the state of this record. However, I will reserve decision overnight.

Do you have cross-examination of this gentleman?

MR. SHERR: No.

THE COURT: You will not. All right.

MR. SHERR: I understand your Honor is reserving decision on the offer of the books into evidence?

THE COURT: Overnight.

MR. SHERR: I have an objection on the record as to both books and as to the photographs.

THE COURT: I appreciate that, and as to the photographs, all right.

MR. SHERR: For the purposes of the record, so we understand it, because your Honor evidently had a different recollection than the Government than myself, there was no testimony that these girls worked with Nancy.

THE COURT: I thought there was some testimony that the very first night she was there, she was sent out with another girl.

MR. SHERR: No, your Honor, she said the first night she was there, the first night she went to see this other girl.

MR. PADGETT: I think your Honor's recollection is in part correct. There was testimony that Miss Sauer was sent out the first night to work, and she did in fact bring in a certain amount of money, but there was no pictorial identification of the individual with whom she went out. It was a pictorial identification, as counsel has pointed out, of the young lady whom she first met upon arriving in New York, but that was not the same girl with whom she went out.

MR. SHERR: That is not my recollection at all, your Honor. She testified that there was a girl that she knew in New York, and she said when they got to New York the first thing they did, they didn't go to his apartment, they went out to dinner. Then she went to this other girl's apartment.

In any event, there was no testimony whatsoever that any of these girls worked with her or worked in the apartment of Mr. Mitchell.

MR. PADGETT: Your Honor, perhaps I would renew my offer of Exhibit 17 with this comment. I believe Miss Sauer testified and identified this photograph as that of Janet, about whom she had a conversation with Mr. Mitchell in Canada, saying that Janet was a prostitute in Toronto with her. I think the record will bear me out on that.

MR. SHERR: Whether or not Janet was a prostitute in Toronto before Nancy ever knew Mr. Mitchell certainly has no bearing in this case. I don't believe that there was that testimony, but even if there were --

THE COURT: Sir, you may step down.

MR. SHERR: I have no questions of this witness.

(Witness excused.)

THE COURT: I will reserve decision on the

books. Are you offering all the pictures?

MR. PADGETT: Yes, sir, I made the offer of 16 through 23, and I made several comments on 17 in particular, sir.

THE COURT: I will reserve decision on the pictures.

MR. SHERR: My objection is to all the pictures.

THE COURT: We are going to recess until the morning. I take it you have the agent who made the computation, you are going to recall the police officer as and when you can lay a foundation for his testimony?

MR. PADGETT: Yes, sir.

THE COURT: So he will be available in the morning?

MR. PADGETT: He will be available should I choose to call him, and then we have a number of stipulations which counsel has agreed to enter into, which should be quite mechanical. Perhaps we can, however, stipulate the revenue agent's testimony.

(Pause.)

THE COURT: Mr. Padgett, just so I can give careful consideration overnight, what is the basis for the book being admissible in evidence? What foundation in your opinion has been laid for it?

MR. PADGETT: Well, your Honor, the book contains -- I am not offering it for the basis of the verbiage of the book. I am offering it merely as the container in which these photographs came, that is, the book which was written by Miss Hall, and the book which was --

THE COURT: The problem I have is that if the book were to be received in evidence, it is received as to its entire contents, and there is no testimony whatever that it is a factual book attributable to this defendant. Whether or not he is speaking, whether or not Miss Hall has --

MR. PADGETT: I am not offering it for those purposes.

THE COURT: Whether she has novelized it in some fashion --

MR. PADGETT: I am not offering it for the purpose of seeking that the words within the book, the comments within the book be attributed to anyone here or to the defendant.

I submit to the Court, however, that MIss Hall has indicated that a certain royalty agreement existed between herself and the defendant regarding the receipt of moneys which resulted from the publication of that

"Gentlemen of Leisure," that contained within that book "Gentlemen of Leisure" is a series of photographs, that these photographs depict a number of young ladies, at least one of whom, 17, has been categorized as a prostitute in Canada at a time prior to the tax year in question, and has been associated with the defendant at a time subsequent to the tax year in question.

That the defendant himself appears in many of these photographs in company with at least one young lady who was testified about by Nancy Sauer.

THE COURT: How does the book in evidence equate to your contention, advance the Government's cause?

MR. PADGETT: Only in so far as it allows the Court to conclude that these photos, which are still photographs, were in fact contained within the book.

51 THE COURT: How does that prove any issue?

MR. PADGETT: Because the only connection with the photographs is either the defendant's picture in some of them, or its appearance within the book from which Mr. Mitchell derived moneys.

THE COURT: I see.

MR. PADGETT: I do not offer the book, and I will repeat that, for the content of the book other than to indicate the photographs.

THE COURT: In other words, you are offering this bool because it contains these photographs, and Mr. Mitchell got paid, according to some proof, the total of what, $3000?

MR. PADGETT: Yes, sir.

MR. SHERR: $1000 in 1971.

THE COURT: $2000 in 1972.

MR. SHERR: And the $1000 in 1971 was turned over or receipted for by the corporation in '72.

THE COURT: That is the contention you raise, that he got a total of $3000, $1000 within the taxable year for this book, and that these pictures are contained in that book?

MR. PADGETT: That is the sole connection between the book and the defendant.

I offer it not for the purposes of any comment within the book.

MR. SHERR: If your Honor please, the mere fact that Mr. Mitchell received $1000 in 1971, and that, by the way, the corporation, not Mr. Mitchell received the other $2000 in 1972, there are many other people who received moneys from the publication of this book.

MR. PADGETT: Objection, absolutely no testimony to that effect.

MR. SHERR: Just a moment, please.

The Court can take judicial notice of the fact that the publisher makes money --

THE COURT: We are only dealing with this one item.

MR. SHERR: We have pictures in a book of girls who have been identified by some of the witnesses as girls they know. There has been no testimony or even any contention or claim by the Government that these girls paid any money to this defendant, that he earned any income from them.

The only evidence that has been offered by the Government with reference to any income allegedly received by this defendant is the sum of $1000 from Susan Hall, and the sum of $10,000 from this girl Nancy, whatever her last name was.

The pictures of the other girls are merely a subterfuge to allow this book into evidence and to make a voluminous record in the event an appeal is required.

I feel that it is highly prejudicial, there is no justification for this book being put in, there has been no establishment as to the sources of the material in the book.

THE COURT: He is not offering the material in

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the book, only the pictures.

MR. SHERR: I understand that, but, your Honor, if he puts it in, it becomes part of the record, and if an appeal is required in this case, the record is already voluminous, and it's just burdening --

THE COURT: Then, if that event were to come to pass, I am sure you can stipulate with the Appellate Court that you hand up the original exhibit, but that is not really a problem.

Let me consider the merits of the offer. The offer is only for the purposes of the pictures. May I have overnight?

MR. SHERR: He has already stated, your Honor, that the pictures he has offered for identification are reproductions of the pictures in the book, so what is the purpose of bringing in the book to show the pictures of which there are reproductions?

THE COURT: He says the books is something for which he claims the defendant got paid, and contains these pictures.

MR. PADGETT: If counsel will concede that these-- since that seems to be the purpose of his objection -- that these nine photographs are indeed accurate reproductions of the photos which appeared In the book, "Gentlemen

of Leisure," I will withdraw my offer of it.

MR. SHERR: The second part of my objection, Mr. Padgett, is they are not relevant. If you got pictures of the Eiffel Tower in that book, do you want to offer that into evidence also?

MR. PADGETT: We have three photos of one of the witnesses.

MR. SHERR: Do you have any evidence as to any of those girls?

THE COURT: Mr. Sherr, please, let's keep to the business at hand. I will reserve decision.

Do you want to give me those books?

MR. PADGETT: Your Honor, there is a possibility that after I have discussed this with counsel, we might be able to stipulate one witness' testimony.

THE COURT: We will stand in recess until 10 o'clock tomorrow morning.

(Adjourned to Wednesday, July 3, 1974, at 10.00 o'clock a.m.)

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UNITED STATES OF AMERICA

vs. 74 Cr. 265

JAMES MITCHELL.

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New York, July 3, 1974;
10.00 o'clock a.m.

(Trial continued.)

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MR. FADGETT: Your Honor, there are some minor housekeeping details we should take care of. There is some 3500 material with respect to Agent Clarke's testimony. I have shown that to defense counsel. It has not yet been marked as 3500 material, however. They have indicated to me that they do not wish to question Agent Clarke with respect to this. It consists of his grand jury testimony, a memorandum of contact relating to that conversation between himself and Mr. Mitchell about which he testified.

May each of these be received as 3500 material.

(Government's Exhibits 3518 and 3519 were marked for identification.)

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THE COURT: Mr. Sherr, you have been quoted here as saying you do not desire to cross-examine Agent

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Clarke. I take it that is so?

MR. SHERR: That is so, your Honor.

THE COURT: Having examined the 3500 material?

MR. SHERR: That is so, your Honor.

THE COURT: All right, go ahead.

MR. SHERR: If your Honor please, in view of the colloquy that occurred at the end of yesterday afternoon's session concerning a proposed offer of evidence of certain photographs and of certain books, and a difference with respect to the recollection of both the Government and myself and your Honor concerning the testimony as it affects it, I am in a position where I would like to read into the record certain portions or two excerpts from the grand jury testimony of Nancy Sauer; or if not permitted to do so, then I ask that she be recalled for the purpose of asking her whether or not those questions and answers were made.

The questions and answers relate, one, to her activities on the first night in which the grand jury testimony indicates that she rejected a proposal by Mr. Mitchell that she work the first night; and I believe your Honor indicated that his recollection was that she had testified that she had worked the first night she was in New York.

The second thing is that with respect to the girls involved involved in the picture, there is testimony before the grand jury on page 60 that none of the other girls ever gave Mr. Mitchell any money, and in so far as the offer by Mr. Padgett to introduce the pictures of these other girls, I think that affects the offer of evidence as to whether or not it has any bearing. I think that that testimony should be before the Court.

MR. PADGETT: Your Honor, I would have no objection if the entire grand jury testimony of Nancy Sauer be received as an exhibit.

MR. SHERR: I will accept that.

THE COURT: All right, it may be received.

Mr. Sherr, I may say to you that before any decision is rendered in this case, I am going to ask Mr. Birnbaum to read back to me substantial portions of the testimony of at least two witnesses so that my recollection is refreshed as to their testimony.

MR. SHERR: Is this going to be marked as an exhibit?

MR. PADGETT: I might suggest that since Miss Sauer's grand jury testimony has already been received as 3500 material and so marked, we use that very same material as an exhibit. I understand counsel wishes to

refer to it during his summation.

THE COURT: Why don't you give it a defendant's number in evidence.

(Defendant's Exhibit A was received in evidence.)

xx MR. SHERR: This is the grand jury testimony given on August 3, 1973 starting with page No. 2 and ending with page 72.

This is a Xerox copy except with respect to one page where I have the original page, where the Xerox copy evidently wasn't made of that.

I would like to make clear that I am not offering this exhibit in evidence with respect to the proof of the contents, but rather with respect to the question of credibility of the witness, and her testimony as given during the course of this trial.

I would like to respectfully refer your Honor's attention --

MR. PADGETT: Your Honor, this is matter, I think, that can be covered in summation, can't it?

MR. SHERR: This will take me two minutes, and we can leave it, Judge.

THE COURT: Let's leave that for summation. I wish you would conclude the proof here. You have

offered this in evidence as an attack upon credibility.

MR. SHERR: I would just like to direct your Honor's attention to certain portions of it, because that is the purpose of the --

THE COURT: Is that in connection with anything that is immediately before us?

MR. SHERR: Yes, your Honor.

Your Honor has an offer in evidence on which your Honor has reserved ddcision.

THE COURT: All right, go ahead.

MR. SHERR: I would like to direct your Honor's attention to pages 40 and 41 starting with line 24:

"Q The first night you were in New York, Mr. Mitchell suggested that you become a prostitute in New York; is that right?

"A Well, he suggested it, yes.

"Q You rejected it?

"A Yes, because I was -- he said, 'Come down and visit me for a few days,' and I got mad.

"Q You got mad and you refused him point blank?

"A Yes."

That was with regard to any testimony that may have been offered with regard to the fact that she worked

as a prostitute that first night.

I further respectfully direct your Honor's attention to page 60, starting with line 12:

"Q How many girls were working for Mitchell in the summer of 1971?

"A I don't know if they were working for him or --

"Q How many? Go ahead, continue.

"A He had a lot of girl friends, I guess.

"Q How many girls told you in the summer of 1971 that they gave James Mitchell money?

"A None of them.

"Q None of them? You told them that you gave him money?

"A No, I didn't.

"Q What did you tell them?

"A Pardon?

"Q What did you tell them?

"A Well, I never really saw them that much.

"Q You just said to us that you discussed with them how much money --

"A We talked a little bit, girl talk. I mean we weren't allowed to discuss things like that, or if he found out about it, he didn't like it.

He got very annoyed:

"Q Did the other prostitutes ever tell you how much money they were making?

"A Well, he had girls. I don't know if they were -- I don't know about prostitution.

"Q Did any of the girls tell you how much money they were making?

"A Sometimes they did, sometimes they say, 'Well, I made $100.' I don't know if they gave it to him. I don't know."

THE COURT: Go ahead.

MR. PAGDETT: I am sorry. I am at a loss to understand the purpose of reading that testimony.

THE COURT: This is in connection with an offer that was open last night of Exhibit 25 and 27 for identification.

MR. PADGETT: As I understand it then, counsel's objection to the receipt of those items in evidence is because Nancy Sauer did not have any conversations in the summer of 1971 relative to any prostitutes cerning receipt of money by Mr. Mitchell? I fail to see how that goes to the receipt of non-receipt of the evidence.

I point out to the Court that the photos offered in evidence, three I believe are photos of one of the

witnesses; four, I believe, are photos of the defendant, and the remaining two are photos of a girl identified as Janet Milanczak, whom the witness Sauer identified as a prostitute in Canada having acquaintanceship with Mr. Mitchell at the time she first had a conversation with Mitchell in Montreal in May of 1971, and whom Agent Clark identified as a girl he saw in a motel room with the defendant Mitchell in 1973.

The second girl is a girl identified by the witness Sauer as a girl named Sandy to whom she was introduced by Mitchell the very first night she came to New York with the defendant Mitchell, and whom the witness Bell identified by photo, as he indeed identified the photo of Janet.

53 I submit, your Honor, that each of the photos contain either a photo of the defendant, a photo of a witness, or in the case of two photos alone, photos of individuals who have been closely connected with the defendant as testified to by witnesses here in court.

THE COURT: Exhibits 16 through 24 for identification, which are the loose photographs, will be received in evidence.

MR. SHERR: Respectfully except, your Honor.

THE COURT: Does your offer go any farther?

MR. PADGETT: Your Honor, I did make the offer of the two books with the understanding that it was only designed to indicate to your Honor, the trier of the fact, that those loose photographs were indeed contained within that book; and since we have had some significant testimony about financial arrangements involving that book, I thought it only proper that the book be offered as a container, and nothing more, of those photographs to indicate to the Court that the photographs offered and now received were contained within that book.

It was not offered to indicate to the Court the contents thereof, and I urge the Court not to regard the offer in that light. I renew my offer of the books.

THE COURT: Incidentally, the witness Sauer identified all of the persons whose photographs appear on the cover of the paper-back, Exhibit 25 for identification.

Is that included in the offer?

MR. PADGETT: Yes, your Honor. She did in fact identify the defendant, herself, her sister, I believe Janet as well, and I think Sandy as well, those being two girls whose photographs were received by your Honor.

THE COURT: I admit the photographs on the cover of 25 for identification.

MR. PADGETT: Thank you, sir.

THE COURT: Mr. Padgett, what is the conclusion that you would urge upon me as the trier of the fact from the fact that these same photographs that are now in evidence are included in 25 and 27 for identification?

MR. PADGETT: Well, sir, there has been testimoney from a rather reluctant witness, Miss Hall, that there was a financial arrangement excisting between herself and the defendant which resulted in the payment of some moneys to the defendant in the tax year in question. That financial arrangement concenred the production of a certain book.

In view of the fact that the witness' testimony was greatly restricted, and, indeed, your Honor allowed me permission to treat the witness as a hostile witness, I found myself greatly restricted in the type of questions I could put to that witness, and feel that because of her hostility and her assertion of certain privileges, I was not to be permitted to explore the full knowledge that that witness possessed.

Accordingly, your Honor, I confess quite candidl to the Court that these photos and the book may indicate to the Court, A, corroborative evidence of the witness' testimony, but more importantly than that, they show the

defendant to be engaged in the case of the photographs of Miss Sauer and her sister, to be engaged in at least social intercourse with prostitutes, thus affording the Court the possibility of drawing a conclusion that the defendant had a likely source of income, and the defendant did have available to him the income concededly produced by prostitutes.

The same argument would hold true for the photos of Janet Milanczak and Sandy. The other photos show the defendant himself as pictured in the book. They would tend again to corroborate the testimony of Miss Hall, a most reluctant witness.

THE COURT: Mr. Sherr, any objection to the receipt of these books solely to the extent that the same photographs are in these books as are now in evidence?

MR. SHERR: Yes, sir.

THE COURT: On what ground?

MR. SHERR: The books themselves are highly prejudicial in nature. It is impossible --

THE COURT: They are not offered. It's only the pictures.

MR. SHERR: The pictures are already in evidence. If there were pictures that were not in evidence that he was trying to get before your Honor, I could

understand it; but here he is trying to get into evidence a book allegedly solely for the purpose of showing that it has pictures which are already in evidence.

THE COURT: But this is in connection now with the receipt of some income, I gather, in part the Government will assert, occasioned by the fact that the defendand permitted his photograph to be used in connection with the book, and is it therefore not proper that the photographs certainly be admitted in evidence as the proof of that fact?

MR. SHERR: I will concede that the witness testified, the witness Susan Hall testified that she paid $1000 to the defendant.

THE COURT: Her testimony was $3000, $1000 in 1971 and $2000 in 1972, to Porcupine Productions, Inc.

MR. SHERR: She paid $1000 to the defendant in 1971.

THE COURT: Right.

MR. SHERR: She made certain additional payments to Porcupine in 1972.

THE COURT: The Government is contending that the payments to Porcupine were in fact payments to the defendant.

MR. SHERR: It couldn't concern me at all, your

Honor. Those are paid in 1972. Until we are indicted for '72 --

THE COURT: All I am saying is, isn't it permissible as part of the Government's case to show that these photographs of this man are in fact in this book, and that that is some consideration for the moneys that he received?

MR. SHERR: I will concede that there are photographs in the book.

THE COURT: And that they are identical to the ones in evidence?

MR. SHERR: That I have to check, if it please your Honor.

THE COURT: All right.

MR. SHERR: I am advised that they are, so that I will concede that.

THE COURT: The books, referring to 25 and 27 for identification --

MR. PADGETT: Yes.

THE COURT: Based upon that, I take it you withdraw your offer?

MR. PADGETT: With the proviso, your Honor drew my attention to the fact that there has been testimony concerning the photos on the front of the book.

THE COURT: That has gone into evidence already.

MR. PADGETT: Then I withdraw that concession and a proviso that the front of the book has gone into evidence, I withdraw the offer of he remainder of the books.

MR. SHERR: Is the front of the book going into evidence solely for the purpose of showing that it is a photograph?

THE COURT: It was identified by Nancy Sauer as photographs of the defendant, herself, her sister, and two other girls.

MR. SHERR: That it's a photograph of certain individuals, and for no other purpose.

THE COURT: That's right.

All right, 27 for identification is withdrawn.

25 for admission is admitted to the extent of the photographs on the cover, the cover only, and the balance is excluded.

(Government's Exhibits 16 through 24 and 25 as limited were received in evidence.)

xx MR. PADGETT: As we indicated at the opening of the trial, there are already certain stipulations entered into herein. We have now signed those stipulations, and at this time I would offer them as Government's

Exhibit Exhibit 30, a stipulation entered into between the Government and the defendant and signed by myself, Mr. Werner, and Mr. Mitchell, to the effect that if a representative of the Brookhaven Service Center were called to testify, he would testify that the individual tax returns for the years 1946 through 1973 are kept at the Brookhaven Service Center; that he he has searched those records to determine whether or not any income tax returns had been filed by individual taxpayer James Edward Mitchell, Social Security No. 276-46-7499, for the calendar years 1970 through 1972, and could find no such returns.

54 THE COURT: This is for the State?

MR. PADGETT: This is the United States Government, sir.

The Government would offer this stipulation as Government's Exhibit 30.

(Government's Exhibit 30 was received in evidence.)

xx MR. PADGETT: The Government would offer as Government's Exhibit 31 a stipulation entered into by defendant and his counsel and by myself that if the Director of the New York State Department of Taxation were called, he would testify that he has caused the records of the New York State Income Tax Bureau to be searched, and

that no income tax returns were discovered filed by James Mitchell, Social Security No: 276-46-7499 for the calendar years 1970 through 1972.

We offer that as Government's Exhibit 31.

THE COURT: That will be received.

(Government's Exhibit 31 was received in evidence.)

xx

MR. PADGETT: I offer as Government's Exhibit 32 a stipulation entered into by the defendant, his attorney, and myself, that if a representative, Mr. W. G. Fine, of the Social Security Administration, were called he would testify he caused the records of the Social Security Administration to be searched, and that no earnings were credited to the records of James Mitchell, Social Security No. 276-46-7499 for the period March 31, 1970 through March 31, 1972, and further that he prepared Government's Exhibit 33, a certification to that effect.

THE COURT: It may be received.

(Government's Exhibit 32 was received in evidence.)

xx

MR. PADGETT: Government's Exhibit 33 in evidence would be a Xeroxed copy of an original certification by Mr. Fine to that effect, and I hasten to explain to the Court that the reason I have offered a Xerox copy

is that the original contains certain information not only about Mr. Mitchell but also about other individuals who have been indicted, and we may need the original at those trials.

I offer, however, the original and the proposed Government's 33 to counsel to enable them to compare and state on the record whether they are one and the same.

MR. SHERR: They appear to be one and the same.

THE COURT: The Xerox may be received.

(Government's Exhibit 33 was received in evidence.)

xx MR. PADGETT: I will offer as Government's Exhibit 35 a stipulation entered into by the defendant, his attoney, and myself to the effect that if Edward Montenegro were called as a witness, he would testify that he is a revenue agent for the Internal Revenue Service, and thawt he received certain data from Special Agent Clarke which had been received at the trial, and that he, based upon that evidence, performed certain computations, and that using that data and assuming that data to be correct, that the tax that would be due and owing by James Mitchell to the United States Government for the calendar year is set forth in what will be offered as Government's Exhibit 35 attached hereto.

The stipulation is offered as 34.

(Government's Exhibit 34 was received in evidence.)

xx MR. PADGETT: The Government would offer as Government's Exhibit 35 the report of Agent Montenegro referred to in Government's 34 and containing the computations of income tax and various penalties.

(Government's Exhibit 35 was received in evidence.)

xx MR. PADGETT: With the receipt of those items in evidence, the Government would rest.

THE COURT: Mr. Sherr?

MR. SHERR: If your Honor pleawse, at this time I would like to renew certain motions I made during the trial, particularly with reference to the testimony of the witness Moyal and the introduction of Exhibits 4 through 8 relating to an automobile owned by the defendant's mother, Donna Mitchell, and the purchase of another automobile by the defendant's mother, which were offered in evidence subject to connection, and it was accepted on those terms, and since no further evidence or testimony was introduced that in any way connected either of these automobiles or the purchase thereof to the defendant, I respectfully move that the testimony with regard to those automobiles from

Mr. Moyal and the exhibits themselves be stricken from evidence.

THE COURT: Do you want to be heard on that?

MR. PADGETT: Yes, sir, very briefly.

It is not my recollection, your Honor, that there has been any testimony concerning the defendant's mother, be her name Donna Mitchell or anything. That may have resulted from a conversation between defendant and counsel.

MR. SHERR: I have to agree with Mr. Padgett. I am sorry, that is some fact that I knew.

Withdrawn.

MR. PADGETT: However, your Honor, I point out with respect to not only Mr. Moyal's testimony but also testimony concerning other activities of the defendant during the years other than the tax year in question, 1971, this is an income tax evasion case, and we are talking about the intent of an individual, and when one examines the intent of an individual one is forced to conclude the intent not from his statements but from his actions.

One can conclude, and the Court certainly can conclude the intent of the defendant from actions which occurred not only in 1971 but which also occurred in 1972 in part.

I point out to the Court that part of the

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defendant's actions occurred in 1971, and the transactions were completed in 1972. The argument that they don't fall within the tax year in question with respect to Moyal just doesn't wash because it's a continuing transaction.

We have here however, your Honor, testimony by Mr. Moyal that the car was not indeed the car of the individual who was the listed owner, but rather was the defendant's car, that he exercised control necessary over it in the form of paying for it, complaining about the servicing, and indeed in registering it.

Whether or not the defendant used a false name certainly does go to the intent required to be shown. Registering of assets in another's name is certainly evidence of intent to deceive.

I submit, your Honor, the evidence is relevant and material and should be accepted.

THE COURT: Mr. Sherr, my recollection is that Mr. Moyal's testimony was that Mr. Mitchell paid in cash the $1000 due as between the trade-in value of the car and the one that was purchased. This occurred about July 12, 1971, and he thereafter brought the car in for servicing, and he stated it was his car, and in 1972 he brought it in, asked that the registration be transferred to New York, and upon being told there was a sales tax

payable, he paid the sales tax.

So I would deny the motion to strike.

MR. SHERR: Respectfully except.

I now renew my motion to strike from evidence the Government's Exhibits 1, 2, and 3 which relate to the lease of the apartment on Fourth Avenue in that, again, these were taken subject to connection. There was no proof whatsoever offered as to the execution of the lease by the defendant or by anyone on behalf of the defendant.

The only testimony offered by the witness who was on the stand at the time these leases were introduced was that he recognized the initials of someone acting in behalf of the landlord on one of the leases, and did not recognize the initials on behalf of the landlord on the other.

There is no proof whatsoever, no testimony, no offer of proof, as to the execution of these leases by this defendant or by anyone acting on behalf of the defendant.

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55 Further, with reference to Exhibit 3, which is a statement of payments made for rent on the apartment in question, there was no proof whatsoever that this defendant made those payments, and this item of evidence has not been connected to this defendant by any further proof, and that no offer has been made, I respectfully move that those three exhibits be stricken from evidence.

THE COURT: Motion is denied.

MR. SHERR: I renew my motion at this time with respect to Exhibits 10 and 11 where an account card in the name of the defendant at, I believe it was, the Central Savings Bank, and Exhibit 11, which was a statement of account.

The account card was dated October 11, 1972. The statement of account covered a period from October '72 to 1973. These exhibits showed deposits of several hundred dollars. I don't believe the total involved at any one time was more than two or three hundred dollars. The accounts were in the name of the defendant.

I see no relevance whatsoever to the issues before this court, and again, there was no offer of evidence as to the purpose for which these exhibits were introduced.

THE COURT: Mr. Padgett, do you want to be heard on

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that?

MR. PADGETT: Yes, sir. If your Honor will examine Government's Exhibit 10 in evidence --

THE COURT: Are you going to move on 12 and 13 as well?

MR.SHERR: Yes, your Honor.

THE COURT: Why don't we treat them all at once, and let me see them.

MR. SHERR: I have the same motion with respect to 12 and 13. There there is a different situation in that that account was in the name of Dunbar, and there was no proof as to the execution of the account card by this defendant, or ther was no offer in evidence in any way connecting the defendant to that account, to that statement of account.

There is no statement or offer of that evidence showing any deposits or withdrawals or in any way connecting this defendant with that account except for the testimony of Officer Driscoll that he occupied an apartment which bore the name Dunbar on it, and that on occasion the defendant answered to the name Dunbar.

But this was, I believe, the testimony of Officer Driscoll, related to a period several years subsequent to the dates of these accounts, which were 1969.

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I further renew my motion on the ground that these accounts in 1969 have no bearing or connection with this defendant.

THE COURT: All right. Let me see the cards.

MR. PADGETT: Do you wish to examine the ledger sheet also?

THE COURT: Yes, let me look at the ledger sheets, and you may continue, Mr. Padgett, while I am looking at these.

MR. PADGETT: Government's Exhibits 1, 2, and 3, wh relate to the occupancy of a certain apartment --

THE COURT: You are justreferring to those?

MR. PADGETT: Just presently referring to those.

THE COURT: All right.

MR. PADGETT: We have heard the occupancy of a certainapartment in 145 Fourth Avenue by Charles Dunbar from 1969 through 1973 continuously. Officer Driscoll has testified that during that period, during that four-year period, he identifies Charles Dunbar as James Mitchell, and indeed, James Mitchell on numerous occasions responded to the name Dunbar.

It was only after Mr. Mitchell was placed under arrest did he indeed learn his true name.

If you will examine the account card of Charles

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Dunbar made out in 1969, you will note several salient features, sir. First is that the names of Mr. Dunbar's parents are Donna and James, I believe. If you will examine the account card of Mr. Mitchell made out in 1972, you will note that the names of Mr. Mitchell's parents are Donna and James.

If you will look at the initial J in Mr. Dunbar's name, James, and you note the initial J in Mr. Mitchell's signature of the 1972 card, I think you will note a marked similarity.

I think from all those facts, your Honor can conclude that Charles Dunbar in 1969 through 1973 and James Mitches in 1969 through 1963 were one and the same person; that Mr. Mitchell was indeed using the name Charles Dunbar; that there may be a Charles Dunbar who exists somewhere in the world, but for the signatures to be that similar, for the names of the parents to be the same, for the apartment to be occupied continuously during that period, and certainly testified to for a period of some six months by Officer Driscoll, it would be highly unusual, to say the least, were that mere coincidence.

I also point out to the Court that Miss Sauer testified that she was brought to an apartment by James Mitchell in 1971, the tax year in question.

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THE COURT: Mr. Padgett, I am going to deny the motion as to 10 and 11.

What about the transcript?

MR. PADGETT: Well, sir, the transcript is present merely to show that during 1969 and 1972 Charles Dunbar/James Mitchell, because it's the government's contention that they are one and the same person, was sophisticated enough in the world of finance to engage in banking transactions, and it shows that Mr. Mitchell/ Mr. Dunbar is not such a person who is ignorant of financial matters.

THE COURT: All right, I will deny the motion as to 11 and 13.

MR. PADGETT: Thank you.

MR. SHERR: Respectfully except.

If your Honor please, I respectfully request a conference in chambers at this point, and I'd like it with Mr. Padgett present before we proceed.

MR.PADGETT: Is this on the record?

THE COURT: Yes, it should be, I assume. Do you want your client present?

MR. SHERR: No.

(In the robing room.)

MR.SHERR: If your Honor please, this is a very

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uncomfortable thing I have to do now, and it is something that has caused me a great deal of lack of sleep last night, and I feel that I owe it to my client to advise the court, and I really don't know how to handle it. I was planning to put Mr. Werner on the stand. I was advised by Mr. Werner yesterday that during the testimony of Nancy Sauer on at least five occasions that he could be certain of -- I was also advised this by the defendant -- that Miss Sauer looked over to Mr. Padgett, and that Mr. Padgett gave an affirmative nod of his head indicating a yes answer on three of those -- I don't know if it was on two or three of those occasions -- Mr. Werner knows exactly -- at which time the witness answered yes.

On the other occasions, he gave a negative nod of his head, at which time the witness answered no.

I feel that that affects the credibility of the witness. I think I have an obligation on the part of my client to bring it to the Court's attention. This was told to me yesterday afternoon.

Possibly I should have said something to the Court then. I felt I was upset about it, I really didn't know how to handle it or what to do.

I discussed it with Mr. Werner, and Mr. Werner --

THE COURT: Is she available?

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MR. PADGETT: I will speak to one of the agents. I assume so.

MR. SHERR: Mr. Werner is prepared to take the stand and testify to this effect. There were other occasions besides those five where Mr. Werner said she looked to Mr. Padgett for an answer, and there was some movement, but he couldn't in all honesty statewith any definite certainty whether or not there was any indication, but on those occasions he definitely states, and I was also so advised by the defendant.

Unfortunately, I was in a position where, when I was examining the witness, I was not in a position to see any of this. I personally did not see it.

THE COURT: Is it your contention -- and let's be forthright about it -- is it your contention that Mr. Padgett was in effect telling the witness what to answer or was giving a subsconscious movement to his own body as to what he thought the answer was or the fact was or --

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MR. SHERR: No, I want to make it very clear. It's my contention that Mr. Padgett told the witness what to answer.

THE COURT: Told the witness what to answer?

MR. SHERR: Because I questioned Mr. Werner very thoroughly on this, and it wasn't that she looked at him

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and waited for him to do this, and each time when he observed the nod or the negative shake of the head, she answered accordingly. I wanted to make certain this wasn't a reflex action or something like that.

THE COURT: I know I have seen many counsel where a question is asked, and they know what the answer is, and they are shaking their head or nodding their head because they already know what they expect the witness is going to say, and it has nothing to do with coaching of any kind.

MR. SHERR: I have tried a great many cases myself, your Honor, and I am also aware of this situation, and I know that there are involuntary reflexes, but I have received from Mr. Werner a definite statement of certainty that there is no doubt in his mind, because of the time element that elapsed before the answers, and the manner in which it was done, that on those five occasions -- there were others, but on the others he told me he couldn't honestly state because that might have been -- but on those five occasions there was no question in his mind.

The defendant himself independently told me that, but I disregarded it from the defendant. When I heard it from Mr. Werner subsequently, I have to accept the word of my colleague. Mr. Werner is an attorney, and a member of the bar --

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THE COURT: Mr. Padgett, I think obviously you are going to either respond to this, without question.

MR. PADGETT: I will try to keep my response rather restrained, although under the circumstances it's somewhat difficult.

I think that the accusation is perfectly in keeping with the other cheap shoddy tricks that have been performed by the firm of Bandler & Kass, particularly by Mr. Werner and Mr. Sherr, throughout the pretrial in this case.

I deny completely as totally uncalled for and completely false accusations that I coached or urged the witness to respond in any fashion whatsoever.

If I made any movements of any kind whatsoever, and I am not aware of any, they were precisely as your Honor has described them, reflex actions, actions which are perfectly normal and customary and, indeed, actions which I observed both Mr. Werner and Mr. Sherr making on a number of occasions during my direct examination and their cross examination.

If there is to be any such accusation, I suggest that not only is this the forum to make it in, but perhaps the Bar Association should be informed of this, and indeed, the grand jury should be informed of this.

THE COURT: All right. Let's for the moment

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determine how we will resolve the problem in this case.

MR.SHERR: Excuse me, your Honor, Mr. Padgett just made a terrible statement, the cheap and shoddy tricks by the firm of Bandler & Kass. I would like to know what he is referring to.

THE COURT: I am at thispoint only listening to such facts as bear upon the issue that has been raised here, which is obviously a serious charge.

In some fashion, either provately or publicly, I suppose we have to have a hearing of some kind and dispose of this issue. Shall we hold that at 2 o'clock?

MR. PADGETT: I am at the Court's disposal.

THE COURT: All right. I take it that Miss Sauer is available at 2 o'clock or can be made available?

MR. PADGETT: I have just sent an agent to locate her sir. I frankly don't know whether she is available at this time. Every effort will be made to obtain her person.

MR.SHERR: I am in a position with respect to the trial of this defendant of either placing Mr. Werner on the tand as a defense witness to testify to these events I just described, or moving for a mistrial.

THE COURT: I think that a motion for a mistrial is of little effect without having the fact established, because I do not deem any fact established by the fact that

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it is brought to my attention as a statement of counsel at this time.

MR.SHERR: Mr. Werner is prepared to take the stand to testify as to the facts in this case.

THE COURT: I will hold a hearing on that at 2 o'clock, or at such time as all relevant parties can be assembled.

MR.SHERR: Is this hearing going to be held independent of this trial?

THE COURT: My reaction is that it is initially independent of the trial, because it does not go to the merits. It goes to whether there was an improper conduct of a witness. If there is a determination that there was improper conduct in relation to the testimony of the witness, then the course of the trial may be affected.

If it is determined there were no improper efforts with regard to a witness' testimony, then the trial will not be affected.

I do not believe it is part of the trial as such. In any event, we can determine that by 2 o'clock.

MR. SHERR: I think we would have a right to have this as part of the record of the trial.

THE COURT: It's part of the record in any event. Whether it's part of the trial to be considered as a question

on the guilt or innocence of the defendant is another matter. If there were a jury here, this would not be something for the jury until such time as you established your charge, and because if the charge failed, the jury should never know that it had been raised and failed.

MR.SHERR: I did not make these allegations lightly, your Honor. I have nothing to gain from this. I did not know Mr. Mitchell. We are not criminal lawyers by profession. We are basically commercial and corporate lawyers. Mr. Werner is a tax partner. I have no axe to grind.

THE COURT: All right. I think we understand our position, so we will hold a hearing at 2 o'clock.

MR.SHERR: Other than that, the defendant intends to rest.

THE COURT: I take it you make the customary motion to dismiss on the ground the government has failed to prove a prima facie case on Counts 1 and 2?

MR.SHERR: Yes.

THE COURT: I deny the motion.

(In open court.)

THE COURT: The government having rested, and you having moved, the defendant rests and we will, I take it --

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MR. SHERR: Well, no, your Honor, because the subject to --

THE COURT: Subject to this motion.

MR.SHERR: Subject to your Honor's determination, I intended to call Mr. Werner as a witness, as part of the defendant's case.

THE COURT: Do you intend to call any other witnesses on your behalf?

MR.SHERR: No, sir.

THE COURT: Subject to that then, I take it you would move at the close of the entire case for a directed verdict of acquittal on both counts?

MR. SHERR: Yes, sir.

THE COURT: I deny that motion. We will have a hearing at 2 o'clock, it being 11 o'clock now, so the Court will stand in recess until 2 o'clock.

Is there any other business, Mr. Sherr, that we should address ourselves to at this time?

MR. SHERR: Well, except that I would -- subject to this hearing this afternoon, I reserve my right to make a formal motion for a mistrial.

THE COURT: You may have that right reserved. Anything else?

MR. SHERR: Nothing else.

MR. PADGETT: There is one thing I would like

to put on the record, sir, at a bench conference, please.

(At the side bar.)

MR. PADGETT: I would ask the Court to direct me, under penalty of being held in contempt, not to speak to the witness Sauer concerning this matter until she testifies before this Court here.

THE COURT: I wasn't going to direct you because I assumed you would do that in the course of your good common sense and your duties, but if you wish a formal direction, I will give it to you.

MR. PADGETT: I certainly do, sir.

THE COURT: All right, you are so directed.

MR. PADGETT: Thank you, sir.

(In open court.)

THE COURT: Would you please have whoever is communicating with Miss Sauer the direction to be here that she is to speak to no one on any matter having to do with thiscase until she is on the witness stand.

MR. PADGETT: Yes, sir.

(Luncheon recess.)

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AFTERNOON SESSION

2:00 p.m.

(Edward Shaw, Esq., Assistant United States Attorney, also present.)

THE COURT: We are here pursuant to Mr. Sherr's oral motion made this morning at about 11 o'clock to hold a hearing.

Mr. Sherr, do you want to proceed?

MR. SHERR: I call Mr. Werner to the stand, please.

W I L L I A M J. W E R N E R, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR.SHERR:

Q Mr. Werner, what is your occupation?

A Attorney.

Q Are you duly admitted to practice under the laws of the State of New York in this district?

A Yes.

Q Are you a member of the firm of Bandler & Kass?

A Yes.

Q Are you a partner in that firm?

A Yes.

Q You are one of the attorneys representing the defendant James Mitchell in the trial presently being conducted in this matter?

A Yes.

Q Were you present in Court yesterday during the time that I was cross examining a witness whose name, amongst others, was Nancy Sauer?

A Yes.

Q Did you observe anything occurring during this cross examination involving the witness and Mr. Padgett?

A Yes.

Q Would you tell the Court in your own words exactly what you saw?

A On numerous occasions when you were cross examining the witness Nancy Sauer, before she would respond to your question she would look over to Mr. Padgett.

I was seated at an angle in back of Mr. Padgett the way I am seated now to my left to defense counsel table; and on numerous occasions I observed Mr. Padgett nodding his head either in the affirmative or in the negative.

After that, the witness Nancy Sauer would respond accordingly.

Q Were these nods, either affirmatively or

negatively, made after a question had been posed to the witness and before an answer had been made?

A Yes.

Q Was on each of those occasions the answer in conformity with either the negative or the affirmative nod?

A Yes.

Q Do you recall any of the specific questions during which these incidents occurred?

A I do not recall the specific questions. I do recall the general area that you were cross examining the witness.

Q What was that area?

A It dealt with whether or not she and Mr. Padgett had spoken about her immigration and naturalization status in the United States, and her tax status.

I think your cross examination was intermingled at that point between those two subjects.

Q Are you referring to the questions that I placed to her as to whether or not she had any conversation with Mr. Padgett to the effect that her failure to file a tax return was a crime?

MR. SHAW: Your Honor, I hope you will permit me to participate in this.

THE COURT: You may participate, Mr. Shaw.

MR.SHAW: I should identify myself on the record. My name is Edward Shaw. I am attorney in charge of the field office of the Organized Crime Section in which Mr. Padgett is a staff attorney.

May the last question be read, if your Honor please?

(The last question was read.)

A In that general area.

Q Are you also referring to a series of questions I placed to her where I asked her whether or not she had any discussions with Mr. Padgett about the fact that she might be considered to be in the country illegally and was subject to deportation?

A In that general area.

Q Is there any doubt in your mind with respect to whether or not the movements of Mr. Padgett's head, either affirmatively or negatively, were as you testified to?

A I testified as to the truth with no doubt in my mind as to what I saw.

Q Was there any possibility that it might, in your opinion, that it was an involuntary gesture?

A Not in my opinion.

Q Are you prepared to take a lie detector test ?

A Yes.

MR. SHERR: If your Honor please, I submit to your Honor that because of the importance of this thing, I request a lie detector test to be ordered in this matter.

THE COURT: I deny it.

MR.SHERR: I have no further questions.

MR. SHAW: May I cross examine, your Honor?

THE COURT: You may.

CROSS EXAMINATION

BY MR. SHAW:

Q You will have to forgive me, Mr. Werner. I wasn't here, so I don't know exactly when Miss Sauer testified. Will you tell me when that was?

A She testified -- today is Wednesday -- I believe it was Monday and Tuesday.

Q Well, which?

A Both.

Q Monday and Tuesday?

A Part of Monday, part of Tuesday.

Q And on what day was she on cross examination?

A Tuesday.

Q In what part of the day?

A When Court reconvened. I think it began at 10 o'clock.

Q So that she was under cross examination starting at

10 a.m. yesterday; is that accurate?

A That's correct.

Q Was that in this courtroom?

A Yes.

Q The gentleman doing the questioning was Mr. -- I am sorry --

MR. SHERR: Mr. Sherr.

Q Mr. Sherr?

A Yes.

Q And you were seated in the chair to the right of where Mr. Sherr is now seated; is that right?

A Yes.

Q For how long a period of time did the question dwell upon the subject matter that you have just identified as the subject matter during which the motions of Mr. Padgett's that you have identified took place?

A A short period of time.

Q How short?

A Five, ten minutes.

Q For how long was she under cross examination all together?

A I think we started the continuation of the trial yesterday at 10:20 o thereabouts, and her cross examination, I believe, extended throughout the morning until the lunch

break, which was probably about 12:30.

Q Your testimony only a few minutes ago has been that you observed the motions that you have identified here on numerous occasions; is that right?

A Yes.

Q How numerous?

A About four, five, six, something like that. I don't remember exactly.

Q You have sworn here that there is no question in your mind as to what Mr. Padgett was doing; is that right?

A I said in my opinion there was no doubt in my mind.

Q Is it fair to say that that was your opinion as you observed happen whatever you say did happen?

A Yes.

Q Did you take any notes as it was happening?

A Written notes?

Q Yes.

A No.

Q Why not?

A I didn't feel it was necessary. I was waiting for the break to confer with my partner.

Q What break is that?

A Lunch break.

Q Do you say that you conferred with your partner

at that time?

A Yes, I did.

Q What did you say to him?

A I told him that I observed Mr. Padgett nodding his head in the affirmative and the negative between your questions and answers, of Miss Sawer and the witness.

Q Tell me how one nodds his head in the negative. You are shaking your own head from left to right and right to left?

A Or right to left and left to right. I don't know.

Q Is that what you say you observed?

A Yes.

Q And you discussed this with your partner immediately upon the termination of the cross examination?

A Yes, which was the lunch break.

Q Did you tell him that in your solemn opinion it was in effect corrupt conduct by Mr. Padgett?

A I don't think I used those words.

Q In substance?

A I said I think it's wrongful.

Q Did you tell him that you had no doubt that it was wrongful?

A Again, I don't think I used those words, but in substance, yes.

Q Give me the chronology again. You got through with the cross of Nancy Sauer at the end of the morning; is that right?

A Yes.

Q How did it come about, sir, that as soon as you saw what you say you saw, you did not ask the Judge for permission to call that to his attention then and there? How did that happen? Why did you not do it?

A I am not that familiar with practice of trials, and I wanted to tell my partner about it, who is our litigatin partner, and let him take the appropriate steps, if any.

Q Are you saying you have never tried a court case?

A That's correct.

Q Is this the first time you were ever in a courtroom?

A No.

Q This is a non-jury matter, am I right?

A Correct.

Q So that when this incident that you have described, or series of incidents that you have described, took place, it was in the context of the court presiding and the attorneys here and the defendant and the witness; is that right?

A Yes.

Q And you are saying that it was an unfamiliarity

with court practice which caused you not to seek to stop what you say was an obvious obstruction with respect to the witness' honesty; you are saying it was a lack of familiarity with court practice which caused you not to intercede at that point; is that right?

A Correct.

Q Was it a lack of familiarity with court practice which caused you not to beckon the attorney to come over so that you could whisper to him what was going on?

A Correct.

Q Are you saying as you sit there, sir, that this proceeding in this trial over the last couple of days has appeared to you as a novice in court practice to be such a formal proceeding that you could not have asked your partner to walk the ten feet from here to there so that you could have notified him of the fraud?

MR. SHERR: I have to object to that. That is argumentative.

THE COURT: I will allow it.

A Could you repeat the question, please?

THE COURT: Yes. Could it be read back?

(Question read.)

A Thatis correct. I thought it would be proper to wait until the defense attorney handling the case would

be finished with the witness and then talk to him.

Q In any event, I take it you are saying that you did not in any way communicate your concern that you have described in court here today to your partner at any time while the examination of Nancy Sauer was going on?

A Correct.

Q Is it your sworn testimony that there were no occasions at all while Nancy Sauer was under cross examination that you conferred with your partner, no occasions when you asked him to come over and talk to him about anything that was going on in the conduct of the cross? Is that your testimony?

A I do believe I never spoke to him while he was cross examining, unless there was a recess.

Q Was there a recess?

A I don't recollect.

Q Well, try.

A I don't recollect.

Q We are talking about yesterday. Try to remember.

A Your yelling won't help. I don't recollect.

MR.SHERR: May I respectfully ask the Court to admonish counsel not to yell at the witness.

THE COURT: I did not conclude that he was yelling, and I therefore would not admonish, given the absence of the

state of facts calling for it. You may proceed.

MR. SHERR: If your Honor please, he certainly raised his voice.

THE COURT: That may be, to emphasize a point. Proceed, Mr. Shaw.

Q Mr. Werner, sit there, sir, and take whatever time it takes, and try your level best to remember whether there was a recess while Nancy Sauer was under cross examination yesterday.

A I honestly don't recollect. I do remember there may have been what was referred to as side-bar conferences, and we all approached the bench, but I don't remember a recess being called or not being called during her cross examination.

Q Were there any side-bar conferences during her cross?

A I would probably -- I don't know, but I would probably say yes, because we had numerous ones yesterday throughout the day.

Q So your best recollection is that there were?

A My best recollection is I don't remember.

Q In any event, at no time while Nancy Sauer was on cross examination did you have any conversation whatsoever with your partner; is that your testimony?

A Yes.

Q On any subject?

A Yes, except if we had a recess, then I may have spoken to him.

Q And you don't remember whether you had a recess?

A No, I honestly don't.

Q How soon after the termination of the cross examination of Nancy Sauer did you call to the attention of your partner the things which you have mentioned here here in court?

A Since it was a lunch break immediately thereafter, we were on our lunch time.

Q I want to know precisely where you were and precisely when it was that you first called this matter to the attention of your partner.

A We went out to lunch, a restaurant, I don't know where, about a block or a block and a half away, and we sat down at the table, myself, my partner, and the defendant; and we were talking about the trial, and I brought that up.

Q Had the witness been excused then?

A Yes.

Q And had his Honor said, "Miss Sauer, I guess that's it, you may go now"? I mean in substance.

A In substance.

Q And you are certain that you did not call to the attention of your partner or of anyone else the things that you have testified to here prior to the time that Miss Sauer was excused?

A Mr. Mitchell and I observed the same thing, and we looked at each other, and he made a hand motion, and I went like this as if to say, "Let me Sherr finish, please, I want to hear."

Q I am talking about oral communication. I am asking you, are you certain you had no conversation about what you say you observed prior to the time Nancy Sauer was excused as a witness?

A No, now that I sit here and think, I did.

Q Who did you talk to, sir?

A We must have had a recess, and I think we may have stepped outside the courtroom, and at that time I told Mr. Sherr my observation, and he said that he would try to see if he could observe the same action.

Q How many of the four or five or six occasions on which you observed it had transpired prior to that recess?

A I don't know.

Q Give us your best memory.

A It would be a guess. . .

Q Had any of them happened before that recess?

A Yes.

Q Had all of them happened before that recess?

A I don't believe so.

Q Where did you talk with your partner during that recess?

A I believe in the corridor outside the courtroom.

Q What is it within the last ten minutes that has caused you to remember that recess, you not having remembered it only a few minutes ago? What has brought that to your memory, sir?

A Your constant questioning whether there was a recess, and I was trying to delve into my memory to recollect whether there was or was not. I told you I didn't remember, but as we are talking, I do remember.

Q Did the cross examination continue for a substantial period after the recess?

A That I don't know. I don't know the break in the time.

Q Did you see further instances of the conduct you have described after the recess?

A I believe there were two.

Q Two more after the recess?

A I believe so. I believe so. I am not certain.

Q On the occasions of those incidents, did you ask your partner to come over so that you could confer quietly with him to see whether he had observed them?

A No, because I believe he was asking one question after another very rapidly of the witness at that time, and I think that was towards the end of her testimony.

Q Did your partner tell you when you had lunch with him yesterday that he too had observed these incidents?

A He said he did not.

Q What happened yesterday afternoon so far as the trial was concerned? Again, forgive me, not having been here I don't know.

A It continued. I mean, I don't understand your question.

Q Did the trial continue after a luncheon recess?

A Yes.

Q Why did you not immediately go to hisHonor and apprise him of the corrupt conduct of which you were certain at that time?

A Again I tell you a lack of familiarity with the practice in trial.

Q How about the gentleman who is trying the case? Is he a trial lawyer?

A He is our litigation lawyer.

mcbr 31

Q And you had discussed it with him at lunch; had you not?

A I had told him.

Q Did you discuss with him whether or not you should not immediately go to the Judge and apprise the Judge of this conduct that you have sworn you thought was corrupt conduct?

A No, I didn't ask him whether I should go to the Judge or not go to the Judge.

Q Why not?

A It didn't dawn on me. I just related to him what I had observed.

Q What did he say to you about what if anything you would do about this?

A He asked me whether I am certain again as to what I have stated. I told him yes. He then asked Mr. Mitchell whether he had seen that, and he then said to me, I believe, that if there will be anything further about this, he would let me know.

I said, "Fine, you are handling the trial."

Q Did youhave any discussion with your partner about immediately calling this to the attention of the Court?

A No.

Q Did you and your partner ever have a discussion on th

subject of bringing this to the attention of the court?

A Yes.

Q When was that?

A I picked up my partner outside his home today on the way down to Court approximately 9:30, and we had a discussion about it in the car coming down here.

Q What was that discussion?

A Mr. Sherr said that he gave it a lot of serious thought overnight, about this incident or incidents, and he feels dutybound that he should report it to the Judge, and that I should be ready to take the stand if necessary.

Q Tell us again precisely what it was that you observed on these occasions.

A I observed Mr. Sherr asking the witness, Nancy Sauer, a question. Before she responded she would look over to Mr. Padgett. Mr. Padgett on occasion would nod his head in the affirmative or the negative, and then Miss Sauer would respond accordingly.

Q About how much time would elapse then between the asking of the question and the answering of it on those occasions?

A Seconds. I didn't time it.

Q Your best memory, sir.

A I don't know. Very short period of time.

Q Your best recollection as to how many seconds?

A Almost immediately, maybe ten seconds. I don't know.

Q Ten seconds?

A Five seconds, I don't know. I have no idea.

Q You say that at least after the recess this occcurred during a period of rapid-fire questions by your co-counsel?

A I believe so. There was quite a series of rapid-fi questions at one point.

Q So I understand what you mean, I take tia rapid-fire question require a rapid-fire answer in order for the next question to be rapid-fire; is that accurate?

MR. SHERR: I object to that, if your Honor please.

THE COURT: I will permit it.

A You want to repeat the question?

THE COURT: Read it back, sir.

(The last question was read.)

A No.

Q Beg your pardon?

A Not to my understanding.

Q What is rapid-fire questioning then.

A If the attorney was asking questions rather

quickly, and as soon as the witness would answer he would without pause or hesitation go right into the next question.

Q Didn't you tell us, sir, on your direct examination that the five or six or four instances that you observed occurred during a period of five or ten minutes worth of questions?

A I said most of them.

Q Say it again.

A I believe I said most of them. If not, that's what I meant to say.

Q Which is it, all of them or most of them?

A Most of them.

Q Is it your testimony that this recess took place between the most of them and the balance of them? Is that it?

A Yes.

MR.SHAW: I have no further questions. Thank you.

THE COURT: Any redirect?

You may step down, Mr. Werner.

(Witness excused.)

MR. SHERR: If it please your Honor, I would like to take the stand in this matter.

THE COURT: All right.

W I L L I A M S H E R R , called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

THE WITNESS: If I may testify in narrative fashion --

THE COURT: Go ahead.

THE WITNESS: If your Honor please, yesterday during the course of my cross examination of Miss Sauer, I was standing to the left of the government's counsel table, slightly in front of Mr. Padgett, so that he was not in my vision.

At some course prior to the end of my cross examination, and I don't recall whether it was a recess or a side-bar conference, Mr. Werner approached me and advised me that he had observed Mr. Padgett making gestures either affirmatively or negatively to Miss Sawer after I had asked her a question, and he suggested that I try to watch Mr. Padgett to see if I could observe him.

I attempted to in the first series of questions, but I subsequently got further involved in the cross examination, and I did not observe Mr. Padgett at all, because I got carried away with my cross examination.

I did, however, during the course of my cross examination on reflection recall that while I was questioning

Miss Sauer, particularly with reference to the questions that I asked her concerning whether or not she had any discussions with Mr. Padgett concerning the possibility of deportation, illegality in the country, and the possibility of her being indicted for failing to file tax returns, that she would look around the room, not directly at me, because I always try to look into the eyes of a witness I am cross examining.

At the conclusion of the examination I went to lunch with Mr. Werner and Mr. Padgett --

MR. PADGETT: You didn't have lunch with me, sir.

THE WITNESS: Excuse me, Mr. Werner and Mr. Mitchell. Mr. Werner asked me if I had observed Mr. Padgett making any gestures, and I told him I hd not. I told him quite frankly that the position I wasin, I was unable to keep him under observation and the witness under observation at the same time.

I asked Mr. Werner if in fact Mr. Padgett had made any additional gestures subsequent to my being advised, and Mr. Werner stated to me that he had on several occasions, either affirmative or negative manner.

Mr. Mitchell was seated with us, and he further stated that he had observed --

MR. SHAW: I object to what Mr. Mitchell

stated.

THE COURT: Yes, sustained.

THE WITNESS: Mr. Werner then asked me what if anyth... I was going to do about it.

I told him I didn't know. I was very disturbed. I have been practicing for 25 years. I am a member of the Ethics Committee of the New York State Trial Lawyers Association. I don't like to make these kind of charges against a fellow attorney.

I questioned Mr. Werner more thoroughly to the extent as to whether or not possibly those shaking or movements of Mr. Padgett's head might have been involuntary or after the fact, after the question rather than prior to the answer -- I mean after the answer rather than prior to it. Mr. Werner in the presence of Mr. Mitchell was affirmative. He said there was no question in his mind, there were a number of other questions, he said, where he sensed movement, but he could not in all honesty define whether or not that movement was either a negative or affirmative one on the part of Mr. Padgett.

He said it was only with reference to those five or six occasions that he could definitely recognize an affirmative nod of the head either in a yes or no manner or in a negative manner.

He said there were at least seven or eight other occasions when he noticed the movement, but he could not in all honesty make a statement as to whether or not that movement was -- had any significance.

Possibly I was remiss in my duty to this court and to the bar. I was very upset about this, and I very frankly, your Honor, I didn't sleep very well last night.

MR. SHAW: Your Honor, I object to this.

THE WITNESS: I took this --

MR. SHAW: I object to whether counsel slept.

THE COURT: I will take it. Go ahead.

THE WITNESS: When I got up this morning, I still hadn't decided what I was going to do about it. Mr. Werner picked me up. I again questioned him in the car as to what had happened, made him repeat the whole story.

I asked him if he would be prepared to take a lie detector test.

MR. SHAW: Your Honor, I object to this as well. I really think the issue of a lie detector test, especially in the context of a conversation between the two of them, is irrelevant.

THE COURT: I think it is irrelevant, but I will permit it.

THE WITNESS: I am only trying to --

THE COURT: Go ahead.

A I then conferred again with Mr. Mitchell when I saw him this morning as to what he had observed yesterday.

THE COURT: I won't permit you --

THE WITNESS: No, I amnot going to say what was said, just I conferred,and I didn't come to a decision to speak to your Honor, I'd say, almost until a few minutes before I did it. I was torn all day. I didn't really know what I was going to do.

I feel very upset about the whole situation.

MR. SHAW: May I ask several questions?

THE COURT: You may.

CROSS EXAMINATION

BY MR. SHAW:

Q Mr. Sherr, you said, I think, that yesterday while you were cross examining Miss Sauer, there was either a recess or a bench conference at which your partner called his observations to your attention and asked you to look out for them as well; is that right?

A That is right, sir.

Q That was during your cross examination during the morning before the luncheon recess?

A Yes, sir.

Q And then yesterday after the final recess of the Court, you extensively discussed this again with your partner is that right?

A During lunch hour, after the lunch --

Q During lunch hour, and then you just got through saying, I think, that this morning you again asked him to tell you the entire course of what had happened, correct?

A That's right, yes.

Q On each occasion that you discussed this with him, did he talk to you about the fact that either at a recess or a side-bar he had brought this to your attention during your examination?

A No, we didn't discuss that because I knew that. What we discussed was what he had observed, what I questioned him about is exactly what he had observed, when he observed it, if he could remember the questions, if he could remember the exact terms.

I cross examined my partner.

Q You said that you try to keep eye contact with a witness the way I am keeping eye contact with you when you cross examine a witness; is that right?

A Yes, sir.

Q That, I take it, is a practice of yours as an experienced trial attorney; is that right?

A Yes, sir, whenever possible.

Q And you are saying that prior to the time that your partner brought this to your attention at either the side-bar or the recess, you had not observed anything on Mr. Padgett's part; is that right?

A I never observed anything on Mr. Padgett's part.

Q I am getting to that part.

A That's correct, yes.

Q I am just asking prior,and your estimony is that even after you were apprised of this by your partner, you did not observe anything; is that right?

A That's correct, sir, on Mr. Padgett's part.

Q How about on Miss Sauer's part? Did you observe her looking at Mr. Padgett?

A I can't swear that she was looking at Mr. Padgett. I did observe that I had difficulty maintaining eye contact with her because she had a tendency of breaking out into a giggle or laugh and would look around while she was doing that before she would answer the question.

Q Even after your partner had brought this to your attention at the side bar or at the recess, did you not make a point of paying attention to whether or not she was looking at Mr. Padgett?

A I tried to in the beginning, yes.

Q What difficulty was there with that?

A Well, unfortunately I get carried away with my cross examination, the questions and answers and the grand jury minutes, and I was at the moment more involved with my questions and answers.

Q Were you standing where I am now at all times during the cross examination?

A Approximately. Originally I had been standing on the other side of the courtroom, but after the first five or six questions his Honor asked me to move to the other side because it was difficult for his Honor to hear the witness' answers.

Q Did you have any difficulty even from this point where I am now in observing Mr. Padgett? Was that a difficult thing?

A No, not if I didn't look at the witness.

Q I beg your pardon?

A Not if I didn't look at the witness.

Q I can see you both. You are saying you couldn't see both Mr. Padgett and Miss Sauer from right where I am standing?

A No.

MR. SHAW: Thank you, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Mr. Sherr, have you any further proof you wish to adduce?

MR. SHERR: If your Honor please, if I understand the nature of this hearing correctly, this hearing is restricted to this one issue.

THE COURT: That's correct.

MR. SHERR: So that in the event I would call the defendant to the stand on this issue, he would only be subject to cross examination on this issue only?

THE COURT: I would limit it to that, that's correct.

MR. SHERR: Then I would call James Mitchell.

J A M E S M I T C H E L L, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHERR:

Q Mr. Mitchell, were you present in court yesterday during my cross examination of the witness Nancy Sauer?

A Yes, sir, I was.

Q Were you seated at the defense table, which would be the chair I am pointing to now, with the chair on the

extreme left as I face his Honor?

A Yes.

Q Do you know Mr. Padgett, who is the United States Attorney representing the government in this case, seated in the center of the government table?

A Yes.

Q During the cross of my cross examination of Miss Sauer, did you observe anything with respect to Miss Sauer and Mr. Padgett? Just yes or no.

A Yes.

Q Will you tell the Court in your own words what it was that you saw?

A A movement and a nodding of Mr. Padgett.

Q When was this movement or nodding?

A When Nancy was answering questions.

Q Was it after I asked a question?

A Yes.

MR. SHAW: Now I object to the leading. I am sorry.

MR SHERR: All right.

THE COURT: Sustained.

Q Tell us exactly. I don't want to lead you, Mr. Mitchell. Tell us completely what it is exactly you saw starting with me, involving my questioning Miss Sauer,

and Mr. Padgett, if you saw anything.

A It appeared to me that when he would ask various questions, she would look to him to determine how and what to answer.

Q Did you see Mr. Padgett doing anything when she looked to him?

A Well, she responded to the way he responded, the way he nodded.

Q What did you see Mr. Padgett do?

A From where I was sitting, it appeared he was nodding his head.

Q Would it be nodding in which way? Would it be up and down or side to side or both?

THE COURT: Mr. Sherr, this is kind of leading too on a critical issue of this hearing. Mr. Mitchell, what you say?

THE WITNESS: At various times in the questions I was watching her more so than Mr. Padgett, and she gave me the impression that she didn't know how and what to answer, and then she would look over to --

MR SHAW: That I move to strike.

THE COURT: I will strike that out. What did you observe about her?

THE WITNESS: Looking over to Mr. Padgett.

Q Then what happened?

A Then it appeared that --

THE COURT: What did you see, if anything?

THE WITNESS: I saw his head nod and her reply yes.

MR.SHAW: I didn't hear, I am sorry.

THE COURT: "I saw his head nod and her reply yes."

Q When you saw his head nod, would you show us, would you demonstrate which way his head nodded? Do it yourself. Do what you saw him dao.

A Like that --

MR. SHERR: Will the record indicate that the witness moved his head vertically from an upward situation down.

THE COURT: I can.

61 Q Did you ever see him move his head in any other way?

A Not his head.

THE COURT: All right, the answer is no.

Q What did you see himmove?

THE COURT: If anything.

Q If anything?

A In the negative, I didn't see him do his head like that, but like to appear like the questioning wasn't

anything, so she would answer no.

MR. SHAW: I am sorry, I didn't hear the answer.

THE COURT: I heard it, but I don't understand it. Would you read it back?

THE WITNESS: What I am saying, I never saw --

THE COURT: No, there is no question pending, Mr. Mitchell. Mr. Birnbaum, read back the last answer.

(The last answer was read.)

THE COURT: I am frank to say I don't understand what the answer means.

MR.SHAW: I move to strike.

Q Can you show us exactly what it was that he did that you just attempted to describe?

A Like I don't remember the exact question, but like if you asked the question were the chairs green, he would make an expression like, you know, the question was nothing, and she would look at him and respond, "Yes, it's green," to react from his expression of the question.

Q Do you recall with respect to these times when you say you observed Miss Sauer look at Mr. Padgett and Mr. Padgett nod his head, what questions or what series of questions were being asked with respect to any of these times?

A It was in this series pertaining to had they

discussed her filing taxes or that she should file any in the United States, in that section.

MR. SHAW: What was the second part, she should what?

THE COURT: She should file in the United States.

MR. SHAW: Thank you.

Q Subsequently, did you have a conference with me during the luncheon recess and Mr. Werner?

A Yes.

Q Did you repeat to me certain things about --

A Yes.

Q Did you al[illegible]hear Mr. Werner make certain statements to me concerning --

A Yes.

Q Do you know what those statements were that Mr. Werner made to me?

A He confirmed what I thought I saw in the courtroom.

Q Do you remember exactly what it was that Mr. Werner said?

A He said that he saw him coaching the witness and --

MR. SHAW: Beg pardon?

THE COURT: Saw him coaching the witness.

A Coaching the witness, and that he had on four or five occasions.

MR. SHERR: I have no further questions.

MR.SHAW: Just a few, sir, if I may.

CROSS EXAMINATION

BY MR. SHAW:

Q Was there ever an occasion when Miss Sauer gave a no or negative answer after you observed Mr. Padgett doing anything?

A I don't understand the question.

THE COURT: Read it back, please.

(Last question read.)

A Is that a yes or no answer?

THE COURT: This one calls for a yes or no in the first instance.

A No, what I am --

Q Answer it as best you can. I don't need a yes or no.

A It was sort of like a gesture, reacting to the questions, so I never saw him say no or --

THE COURT: Did she ever say no after you had seen it?

Q Let me state it again to you.

My question to you, sir, is do you remember any occasion on which she gave a no or negative answer after you saw Mr. Padgett doing anything in between the question and

the negative answer? Did that ever happen?

A Yes.

Q It did happen.

What was it that you saw Mr. Padgett do before the witness gave her negative answer?

A I can't remember any exact questions.

Q No, I am not asking what the questions were. I am asking what it was that you saw Mr. Padgett doing before you heard the negative or no type of answer come out of her mouth.

A It was kindof like a shrug of the shoulders or something, a light movement like that.

Q How do you distinguish in your description to the Judge --

MR. SHERR: Excuse me, may the record indicate that the witness twisted his head towards his right shoulder.

THE COURT: And shrugged his shoulders.

MR. SHERR: And shrugged his shoulders.

MR. SHAW: Fair enough.

THE COURT: It may.

Q How did you distinguish in your description to his Honor between the movements Mr. padgett made when she gave yes answers and the movement Mr. Padgett gave when she gave no answers? --

A The head movement was -- I mean I am not trying to say the pattern, but I noticed like the head movement was, when she said yes, and then he reacted slightly toward the question more so than saying something to her, you know. That's what I am saying.

Q You are not saying at all that he said anything to her?

A Right.

Q And I think you have told us before that there were some times when he nodded his head up and down, ad then she gave yes answers? That is what you testificd; isn't that right?

A Right.

Q But I think you also testified that there were some times when she gave yes answers when he didn't nod his head up and down, but he did something else; isn't that right?

MR. SHERR: I don't believe there was any such testimony, if it please the Court.

THE COURT: Let me hear the question again, please.

(Last question read.)

MR. SHERR: That series of questions that counsel addressed to the witness to which he is referring was what Mr. Padgett did prior to her giving a negative answer.

MR. SHAW: I am asking about before that.

MR. SHERR: There was no testimony.

THE COURT: Why don't you rephrase the question, Mr. Shaw.

Q All right.

Did you ever see Mr. Padgett do anything other than nod his head up and down prior to the time that you heard the witness give a yes answer?

A I still don't understand it.

THE COURT: Read it back, please.

(The last question was read.)

A Is this asking one question, her asking, her being --

Q Let me put it differently. You are saying, sir, that you saw signals; that is basically what you are telling us, right?

A Yes.

Q Did you ever see a signal for a yes answer other than a nodding of the head up and down? That is all I am asking.

A The shoulders.

Q The shoulders, a shrugging of the shoulders?

MR. SHERR: May the record indicate that the witness shrugged his shoulders, and he also dropped his chin

to his chest.

THE COURT: I didn't notice the dropping of the chin to the chest. I just noticed the shrugging of the shoulders.

MR. SHERR: He went like this, your Honor (indicating).

THE COURT: Mr. Mitchell, what was the gesture you just used?

(The witness indicated.)

MR. SHERR: If your Honor please --

THE COURT: I did not observe that the first time, quite frankly, Mr. Sherr.

MR.SHERR: If your Honor please, I am not here to make misstatements of the fact to the Court on an issue like this. I wouldn't make it any time. If there is any question on it, this is what I observed him do. I would not add to it otherwise.

THE COURT: I can say amen to your observation. I was looking myself at the same time. Go ahead, Mr. Shaw.

MR. SHAW: I don't want to pursue this too long, sir.

Q Did you tell us a couple of minutes ago that you saw a shrugging of shoulders by Mr. Padgett when the witness gave some negative answers? Did you say that?

A I don't believe I did.

Q Did you ever see a shrugging of shoulders by Mr. Padgett when the witness gave a negative answer, a no answer?

A I really wasn't paying attention. I just-- I just noticed there were two various movements, and then I noticed that she was reacting. I saw her looking for reaction, and that's -- otherwise, I never even looked at Mr. Padgett.

Q You say you really weren't paying attention, you really weren't paying attention to what?

A To Mr. Padgett. When I saw her eyes searching, this is when I noticed the two various movements.

Q Sir, have you had any occasion to speak with Miss Sauer during the last 48 hours?

A No.

Q You are positive of that?

A Definitely.

Q In person or over the phone?

A No.

MR. SHAW: I have no further questions.

62 THE COURT: Any redirect?

MR. SHERR: No, sir.

THE COURT: You may step down, sir.

(Witness excused.)

MR.SHAW: Your Honor, if I may, could we ask your clerk to do us a favor in a totally different case. Mr. Padgett is supposed to be before Judge Wyatt at 3 o'clock, and I am sure he will excuse him under the circumstances but -- it's one of these same cases, your Honor, that was tried non-jury before Judge Wyatt, and I think Mr. Padgett probably ought to be there.

Would it be all right for your court clerk to call his court clerk?

THE COURT: Absolutely.

(Discussion off the record.)

THE COURT: Mr. Sherr, I take it that is your presentation on this matter?

MR.SHERR: That is my presentation, your Honor.

THE COURT: All right. Mr. Shaw?

MR. SHAW: I certainly think that I want to have Mr. Padgett have an opportunity to testify.

THE COURT: Absolutely.

MR. SHAW: I think your Honor knows that the agents went and got Miss Sauer. She is, I think, outside now. She is available. I understand there was an instruction for her not to talk with anyone, and I think it's true that the people who picked her up don't even know what this

issue is. I am quite sure there has been no conversation with her.

I suppose it makes sense, if your Honor deems it necessary, for me to put Mr. Padgett on right now.

THE COURT: I think it would make sense.

MR.SHAW: Very well.

C H A R L E S E. P A D G E T T, called as a witness in behalf of the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Padgett, you are an attorney with the Organized Crime Section of the Justice Department; is that right?

A That's correct, sir.

Q And you are the attorney who has been trying this case before Judge Owen; is that right?

A That's correct, sir.

Q You were present in the courtroom yesterday during the direct and cross examination of Nancy Sauer?

A That's correct, sir.

Q Was there ever any occasion when you made any motions to her of any kind while she was on the stand under cross examination?

A To the best of my recollection, there were two occasions, either just before or after Miss Sauer had resumed the stand, when I winked to her and smiled at her.

That was the sum total of any of my gestures that I made to her.

Q Was she under questioning at this time or what?

A It was either just after a recess had been declared or just prior to the commencement or recommencement of questioning.

Q So there was no questioning going on?

A Absolutely no questions pending.

Q Did you have any question with Miss Sauer prior to her testimony as to how she should conduct herself as a witness?

A Yes, I did, sir.

Q Specifically, as to how she should conduct herself in connection with any cross examination?

A Yes, I did, sir.

Q What did you say to her?

A I told her that she could be -- she could anticipate being cross examined very vigorously, and that above all she should tell the truth, and that she should remain poised, and if she had any doubts or any problems, she should endeavor to tell the truth and the complete truth.

If, however, she saw me stand at any time, she should cease her responses because that indicated that I was to make an objection; and that was the sum total of the instructions I gave herwith respect to her actions on the stand.

I think I also told her to sit up straight.

MR. SHAW: I have no further questions.

THE COURT: Any cross examination?

MR SHERR: Just one or two questions.

CROSS EXAMINATION

BY MR. SHERR:

Q Mr. Padgett, would it have been at all possible for you involuntarily to have made a motion with your head either affirmatively or negatively after a question was asked in view of your knowledge of the case and the facts in this situation?

A I would imagine, sir, in five years of trying cases, I have made many involuntary motions that have no significance, and were intended to have no significance. I would imagine that has occurred to every trial lawyer.

Q Might it have happened during the cross examination of Miss Sauer that you might have --

A It is as possible for it to happen at one time or another time during a trial. However, I must say that

on cross examination I deliberately try to avoid any motions for the very reason that we are having this hearing.

Q At least you don't recall moving your head in any way in response or when she was asked questions?

A Yes, I do. I remember on some of her more erratic answers, those that brought some response from the audience, I moved my head.

Q I am talking about before she gave her answer.

A Before she gave her answers --

Q After the questions had been placed.

A Between the question and the answer, I don't recollect making any motions at all.

Q Do you recall her ever looking at you during cross examination?

A On a number of occasions, Miss Sauer looked at me. On a number of occasions she looked at the defendant, yes.

Q Do you recall whether or not some of those occasions that she looked at you were after a question had been posed to her and before an answer had been made?

A That's correct, yes.

Q Can you give us your best estimate on how many occasions she looked at you before giving an answer after a question had been placed?

A I would say between five and ten times she looked at

me between the giving of -- the addressing of a question to her and the giving of a response.

Q Is it possible that in any of those five or ten times you may have made an involuntary gesture when she looked at you?

THE COURT: Mr. Sherr, you are going to get an answer that is sheer specualtion. There is no objection to the question but --

MR. SHAW: I am not going to object to it.

THE COURT: I don't know if it has any weight when it's answered.

MR.SHAW: He has asked a few possible type questions which Mr. Padgett has answered. I am not going to object.

A I know on each occasion when a question had been addressed to the witness, not only Miss Sauer, but other witnesses, and that witness looked at me, not only in this trial but in any other trial, I have made a conscious effort to remain absolutely immobile.

There may have been occasions when I moved, but I make conscious efforts on this type of occasion not to move for this very reason.

MR. SHERR: I have no further questions.

THE COURT: You may step down.

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THE WITNESS: Thank you, sir.

(Witness excused.)

MR. SHAW: Your Honor, I am going to leave the calling of Miss Sauer up to the Court. If you see any need for it, and if you want to ask her any questions, she is here I am content to rest on Mr. Padgett.

THE COURT: Do you have any reason to call Miss Sauer, Mr. Sherr?

MR. SHAW: I didn't hear.

THE COURT: I asked Mr. Sherr if he wished to avail himself of her presence.

MR. SHERR: Well, I could assume what her answers will be, but I don't know that to be so, so I would like to put the question to her.

THE COURT: All right.

Is she in the witness room?

ANNA FREDERIKA SAUER, having been previously sworn, was recalled in behalf of the defendan and testified further as follows:

DIRECT EXAMINATION

BY MR. SHERR:

Q Miss Sauer, do you know why you are here?

A Because I was being subpoenaed to appear in court.

Q I know. Do you know why you were called to come

back here this afternoon?

A I have no idea.

Q How were you contacted?

A Somebody called me and told me that they were going to pick me up, and that I had to come in today again.

Q I can't hear you.

A Somebody phoned me and told me I had to come in today, so they picked me up.

Q Did they come and pick you up?

A Yes.

Q Did you ask them why you were coming back?

A I asked them. They told me they didn't know.

Q When did you get back here?

A I got back -- what time did I get here? I got here about 11:30, but it was recess.

Q Miss Sauer, prior to your testifying in this court, you had had a conversation with Mr. Padgett about testifying in court. Do you recall that?

A Yes.

63 MR. PADGETT: Could we say on which date?

MR. SHAW: Are you asking prior to today or when she was a witness in the case?

MR. SHERR: Prior to testifying in court, not prior to today. I am sorry.

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THE COURT: As a witness on this trial. I assumed it was such. Go ahead.

MR. SHERR: Because counsel raised the other point.

Q What instructions did Mr. Padgett give you with respect to your testimony?

A He told me to tell the truth, the whole truth, and nothing but the truth.

Q Did he tell you anything else?

A No.

Q Did he tell you to look over to him if you were in doubt about any questions?

A No.

Q Did he tell you to do anything different if he remained seated or standing?

A No.

Q You recall my examination of you yeterday?

A Yes, I do.

Q Do you recall that there were a number of questions I asked you?

A Yes.

Q Particularly with reference to your conversations with Mr. Padgett about your immigration status?

A I didn't talk to Mr. Padgett about my immigration.

Q Just do you recall the questions?

A Yes.

Q And the questions that I asked you about any conversations you had with Mr. Padgett about failing to file an income tax return?

A No, we never really -- we never talked about that.

Q You what?

A We never talked about that.

Q You never talked about that?

A I mean Mr. Padgett and I never discussed that.

THE COURT: Miss Sauer, you are being asked whether you recall the time --

THE WITNESS: Yes.

THE COURT: -- during your examination when Mr. Sherr was asking you about that.

A Yes, you did ask me, yes.

THE COURT: You remember him asking you about that area?

THE WITNESS: Yes.

THE COURT: All right. He is fixing your attention on that.

Q Are you now saying you never talked about your tax returns with Mr. Padgett?

A Not my tax returns. . .

THE COURT: Mr. Sherr, let's stick with the matter at hand.

MR. SHERR: All right, but this is crucial because it's --

THE COURT: I think the witness' attention is now focused on the time you are now interested in. Now please go forward.

Q During the course of my questions to you, did you ever look over at Mr. Padgett?

A I looked at almost everybody in the courtroom.

Q I am only interested --

A I probably did glance that way, yes.

Q For what purpose?

A Just for my eyes to rest on something. They get tired of resting on you.

Q Now I am at a loss. My wife would be very happy to hear that.

Did there come a time when I asked you certain questions where you weren't sure of your answer?

A Yes.

Q Did you look over at Mr. Padgett while you were pondering your answer?

A I don't know. Sometimes I looked at the Judge. Sometimes I looked at you. Sometimes I looked at Mr. Mitchell

Q Sometimes you looked at Mr. Padgett?

A Sometimes, yes. I think I glanced at everybody in this room at least once.

Q You were sizing up the --

THE COURT: Now, Mr. Sherr. Go forward, please.

MR. SHAW: I really don't think that is an appropriate comment.

MR.SHERR: I am sorry.

THE COURT: Strike that out.

MR. SHERR: That is absolutely improper on my part, and I withdraw it.

Q I am talking now, Miss, about the period between the time I asked you a question and the time you gave an answer. Do you understand that?

A Yes.

Q You say that on occasions you looked at the Judge and on occasions you looked at Mr. Padgett, and on occasions you looked at me?

A Yes, and sometimes I looked at other people. Sometimes I looked at Mr. Mitchell.

Q On some of those occasions after I had asked you a question and before you gave an answer, when you looked at me, did you notice any movement on my part?

A No.

Q Did you see me nod my head in any way or move my --

A I really didn't notice.

Q When you looked at Mr. Padgett, did you ever notice him nod his head or --

A No.

Q Did you ever notice him wink at you?

A No.

Q He never winked at you?

A Yes, once or twice.

Q When?

A I can't remember.

Q During the questioning or while you were getting ready to answer?

A I guess just to give me assurance. I mean like I guess he understood I was nervous.

Q Was it after you had been asked --

A Maybe once, yes.

Q After you had been asked a question and before you gave an answer?

A I really can't remember. I mean I don't write down what time he winked at me and the time, you know. I mean, that's not important.

Q Did he do anything else besides wink at you?

A No.

Q Was he sitting perfectly rigid in his chair?

A I can't remember.

Q Did you see him move his head yes or no?

A No.

Q Did you ever look to Mr. Padgett to see if you had given the right answer?

A No.

Q And to get an affirmative --

A No, I didn't look for him to say, "That's good, Nancy." I didn't expect him to say anything like that.

Q No, I didn't ask if you expected him to say anything. I asked you, did you ever look at him?

A No.

Q Did he ever give you a nod of approval?

A No, he never did.

Q Never moved his head?

A Never.

Q At all?

A At all.

MR. SHERR: I have no further questions.

MR. SHAW: I have no questions, thank you.

THE COURT: Miss Sauer, thank you very much. You are excused.

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proceed in that fashion forthwith.

THE COURT: All right, Mr. Sherr.

Are you ready at this moment?

MR.SHERR: Yes, I am ready.

THE COURT: All right, go ahead.

MR.SHAW: May I be excused, your Honor?

THE COURT: You may.

(Mr. Shaw left the courtroom.)

THE COURT: Incidentally, in connection with the matter of the hearing, I want to add that, Mr. Sherr, I was observing the witness for most of her examination, and I want to state that I did not observe any conduct on her part that I might have concluded was looking to the prosecution table for an answer.

This is a trial judge sitting here observing the witness. I did not observe her every second, but I did not observe anything that at any time would have led me to believe that she was looking at the prosecutor for an answer.

MR. SHERR: If your Honor please, your Honor is aware that I testified that neither have I observed anything on the part of Mr. Padgett.

However, I must say with all due respect to your Honor and to Mr. Padgett, Mr. Werner is an officer of this

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court, has been a member of the bar a long time, would not make a statement like this casually. I very carefully questioned him about this. We didn't do anything rashly here. I did it with a great deal of hesitation and reluctance. I felt that I was concerned about the situation. Since the facts were brought to my attention, I felt that they had to be brought to the Court's attention.

THE COURT: Go ahead, sir.

MR. SHERR: If your Honor please, basically this matter boils down to two simple issues: One, whether or not during the calendar year 1971 Mr. Mitchell received $11,000 in income; and two, whether or not, if he received that income, his failure to file an income tax return was wilful and fraudulent in nature.

The Government indictment alleges that he received in excess of $1700, and I believe it refers to a figure of $15,000, and that by virtue of him having received in excess of $1700 in that year that he was subject to filing a tax return, and as such, his failure to do so constituted a crime; and further, that his failure to do so was wilful and fraudulent, and that constituted the other count of the crime.

We have had testimony from a witness, Miss Hall,

to the effect that $1,000 was paid to Mr. Mitchell in the calendar year 1971.

We have had further testimony to the effect that that $1,000, or at least the receipt for that $1,000 was subsequently issued by Porcupine Productions, Incorporated, a corporation, in 1972. There is a question as to whether or not that $1,000 was received by Mr. Mitchell individually for his own benefit or on behalf of the corporation, as to whether or not it was turned over to the corporation.

THE COURT: Do you want to treat this as in the nature of a dialogue, or would you rather treat this in the way of a jury summartion? Because I was going to ask you questions if you wanted, or not as you see fit.

MR. SHERR: I would prefer to proceed in the manner I am, and then if your Honor wants to ask me questions --

THE COURT: Go ahead.

MR.SHERR: I am not going to pursue the point of the $1,000, because even assuming that that $1,000 paid by Susan Hall to the defendant during the year 1971 was received by the defendant, and was retained by the defendant , not turned over to Porcupine Productions,that $1,000 by itself would not be sufficient to require the filing of an income tax return by virtue of the nature of the indictment which says that the income would have to be in excess of $1700.

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So really, the crucial issue here and the main and only issue is whether or not Mr. Mitchell received $10,000 from Nancy Sauer. We have a situation here where basically I feel that the acquittal or conviction of this defendant is going to rest on whether or not the Court feels beyond a reasonable doubt that that witness, Nancy Sauer, told the truth, and that she paid him $10,000.

It is respectfully submitted to this Court that no evidence outside of her spoken word with respect to the payment of $10,000 has been offered by the government. There has been no evidence of any property owned by the defendant. There has been no evidence of any stocks, bonds, bank accounts, with the exception of the ones that I will mention, of any hidden reserve, any cash vaults, style of living, manner of living, expenditures, anything to substantiate her unsupported statement that she gave him $10,000.

There is testimony that when a car belonging to Donna Mitchell was traded in, that $1,000 was given by Mr. Mitchell to the car dealer.

Whether that $1,000 was his or his mother's was not established, but we are not talking about $1,000; we are talking about a statement of an admitted prostitute that she gave Mr. Mitchell $10,000.

She just as well may have said she gave him $50,000 or $500 or $22,000 or $6,000. She could have picked any figure out of the air. Neither your Honor nor I nor the government can know whether or not she is telling the truth. She kept no books and records, as is probably usual in her occupation. She had no witnesses as to the transaction, no witnesses that she gave him any money.

There were numerous inconsistencies between her grand jury testimony and her testimony on the stand. We have a situation here where a woman has testified on the stand that she is earning $50,000 a year on which she is not paying taxes. The government has not indicted her or charged her with income tax evasion, and they are indicting and charging the defendant for $11,000 income for which he has not paid taxes.

She can hardly be considered an impartial witness. She realizes, she had to realize, that she is exposed both by virtue of her admissions with respect to her earnings which were not covered by the grant of immunity given to her during her testifying at the grand jury, because the testimony as far as her earnings in subsequent years was not brought out in the grand jury minutes.

She has in effect, it would appear, obtained a license -- and I hesitate to say this, but I don't know any

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other way to say it -- a license to practice the profession of prostitution in this city without fear of arrest. She has testified quite openly that she has been practicing prostitution continuously, is still practicing prostitution, and that she has no other means of income.

We have an unsupported statement from this witness, and I think really this goes to the core of the case, because if we are to convict Mr. Mitchell, we must believe her. We must say that her testimony is so credible that no reasonable doubt exists, and yet I wonder.

I respectfully submit to your Honor, if this woman had come in and said that she gave Mr. Mitchell $40,000, we would be in exactly the same position as we are today when she said she gave him $10,000, or had she said two. We have no way of disproving that. Usually, in this type of case, there is some offer of evidence showing the defendant standard of living, the fact that he has certain funds, the fact that where did he accumulate the funds from, the fact that he has certain assets, things like that. There is nothing of that type here, for the very simple reason there isn't any.

The witness at one point testified --

THE COURT: I thought you were going to say for the simple reason that this is a type of an operation that

might not admit it, which is an answer that immediately springs to mind.

MR.SHERR: I am sorry, I didn't hear you.

THE COURT: I say you said there are no books and records and no proof of anything tending to show there was no money in fact involved.

MR. SHERR: No, I am talking about also there is no proof of the receipt of the funds or the disposition of the funds.

Ordinarily, if you have a defendant and he has $42,000 in a savings account, or he has $12,000 in stocks, or he has certainassets, and he says, "I only earned $300 last year," you say, "Well, where did you get the $42,000 in stocks?"

Here, there are no assets. There has been no proof of any assets on the part of the defendant. We have the unsupported blank statement on the part of Nancy, of Miss Sauer, that she gave this man $10,000.

I submit to your Honor that this is the crux of the case, and I submit in all honesty, maybe she did, maybe she didn't. I certainly don't know, and I respectfully submit I don't see any Court can know, because she certainly is not the most credible witness in the world, and I submit to your Honor that certainly at the very best a reasonable

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doubt exists with respect to whether or not she is telling the truth.

She has ulterior motives in testifying. She has something to concern herself with. She would like to stay in this country, she told us before the pickings are much better here. She earns substantially more money here working less than she did in Canada.

She has been a prostitute since she was 17 or 18 years old. We can't exactly consider her of the highest moral standards, or a person to whom we would attach the highest standards of credibility, regardless of her testimony, and in considering the fact that she herself admitted, to my recollection on three occasions, that she had lied to the grand jury about certain things with respect to certain inconsistencies I had pointed out.

I don't really think, to be honest with you, that these people in this field know the difference between the truth and a lie, and they tell whatever suits them at the moment. They will tell whatever story is most convenient, whatever is best for their own livelihood and for their own protection. They couldn't care less about the standards, society's standards and morals and propriety and what is right and what is wrong.

If, as I respectfully submit, the government has

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failed to prove beyond a reasonable doubt this payment of $10,000, then both counts must fall.

On the other hand, if your Honor should find, despite what I have said, that the testimony of the witness Nancy Sauer with respect to the $10,000 is credible beyond a reasonable doubt, then we have to concern ourselves with the wilful nature of his failing to file the return.

In support of these allegations, basically, I think the entire theory depended upon by the government is that he used another name.

The officer testified that he lived next door, and the name Dunbar was on the bell, and that this defendant answered to the name of Dunbar.

There was no denial of the fact that there was an apartment with the name Dunbar. There was a lease introduced that showed the apartment was leased to a Dunbar. There was no proof offered that the Dunbar to whom the apartment was rented was the same individual as this defendant.

But even assuming for the sake of argument that was so -- and let me make a hypothesis directly contrary to my own position and say that this defendant assumed the name Dunbar -- there was no proof offered that the purpose of his assuming the name Dunbar was for the purpose of avoiding

income tax payments.

The government introduced a bank account, the only bank account this defendant had in '72, which would reflect if anything, you know, after thistaxable year, in his own name.

When this defendant was arrested on a minor charge by the officer, he told them his true name. He didn't tell themhis name is Dunbar. He told them, "My real name is James Mitchell."

The officer so testified. That was when he arrested him for harassing, and he got a discharge or something like that.

I am not painting this defendant as an honorary member of our community, of our society, and I am not suggesting to your Honor that this defendant is engaged in any particular occupation, or that he deserves any accolades or that he deserves any consideration.

I am saying to your Honor that this defendant has the constitutional right to be presumed innocent until he is proven guilty, thatthe burden of proving him guilty beyond a reasonable doubt rests with the government, that the one element here, which is the essential element on which this whole case is based, forgetting all the other testimony, is whether or not your Honor in all good con-

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scicnce can say to himself that you believe Nancy Sauer beyond a reasonable doubt that she gave this defendant $10,000, particularly in view of the inconsistencies in her statements and the rest of her testimony.

I submit that if your Honor feels that it is a situation where it may be the truth or may not be the truth, that the government hasnot proved their case beyond a reasonable doubt, and as such, that a judgment of acquittal in all good conscience must be made.

Thank you.

THE COURT: Thank you. Mr. Padgett.

MR. PADGETT: Thank you.

Would you prefer me to make a statement or to answer your Honor's questions?

THE COURT: Why don't you make a statement? I gather you are prepared to do that?

MR.PADGETT: I am prepared to do it either way.

May it please the Court, the only statement of counsel with which I agree is that there are two elements which have to be proved. One is that a tax is due and owing, and the other, that the wilful nature of his failure to do so must be shown by the government. I don't think there is any question that the defendant did not file income tax returns. That has been stipulated to by the defendant.

With respect to the fact that a tax is due and owing, concededly, income was shown to the defendant from only two sources: Susan Hall, who must reluctantly testified, and in connection with a book, she paid the defendant the sum of $1,000 in cash in 1971; and the direct testimony of a prostitute who testified that during 1971 from late May to late August or early September, she paid the defendant the sum of $10,000 because he functioned as her pimp.

The government did not offer any checks, did not offer any books and records, did not offer any receipts by the defendant for that $10,000.

Obviously the nature of the profession would prohibit such receipts or such checks or such books and records.

I daresay that if defendant were to expect the prostitutes to keep books and records, the government could likewise expect the defendant to keep books and records of his activities as a pimp, and obviously these don't exist either. That of course is not significant.

Let us turn, however, to the internal corroboration of Miss Sauer's testimony, and I think her statements are overwhlemingly corroborated.

For example, she was arrested four times as a

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prostitute between June and August 1971. This obviously corroborates her statement that she was a statement during that period.

She identified photos of individuals whom she met either through the defendant or about whom the defendant informed her. These individuals were also identified by Mr. Bell and were also contained within the book "Gentlemen of Leisure," under cover of which the defendant most prominently appeared, and in connection with which he received in 1971 the sum of $1,000 and in 1972 through a corporate shell the sum of $2,000.

The witness testified that she had been a prostitute in Canada. That was corroborated by her record, and that she was brought to the United States by the defendant, and that she remained in an apartment in the vicinity of 14th Street and Fourth Avenue.

The defendant was identified by Officer Driscoll as living in 145 Fourth Avenue. I invite the Court to take judicial notice of the fact that that is between 13th and 14th Street on Fourth Avenue.

The witness' own photo, Nancy Sauer's own photo, is in the book in a number of places, indeed on the cover, directly to the left of the defendant's photo. She is pictured on at least three occasions in the book

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"Gentlemen of Leisure," and certainly this affords substantial corroboration of her testimony that during her stay in the United States she was in at least social contact with the defendant.

She also testified that she knew the defendant, indeed, she was introduced to him as Porky. This was in Canada in a nightclub.

Other witnesses have testified, primarily Mr. Bell, that the defendant's nickname was Porky, and of course I draw the Court's attention to the fact that the corporate shell created by the defendant was Porcupine Productions. Miss Sauer was not --

MR.SHERR: Excuse me, your Honor, I really am reluctant to interrupt counsel during this part, but his constant reference to a corporate shell really is, I think -- has nothing to do with any of the evidence introduced here. It's suggested that a corporate shell was --

THE COURT: I had in mind Mr. Pravda's testimony, so I will treat this as argument of counsel.

MR SHERR: Except that the corporation was formed in '72, your Honor.

THE COURT: Yes.

MR. PAGETT: The government made no representations that Miss Sauer would be an intelligent witness,

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as indeed she was not. Nor did we make any representations that she would be an interesting witness, as indeed she was.

I think, however, by putting her on the stand we did make the representation sub silentio that she would be an honest wintess, as indeed she was.

She answered candidly all the questions put to her by the government. She answered the searching questions put to her by defense counsel. She confessed what she was, a prostitute, confessed what she is, a prostitute, confessed that she is liable for prosecution on income tax evasion.

She may well be liable for prosecution, or at least for deportation to Canada.

No promise of immunity was held out to her, and I think it's quite obvious from the extensive discussions held with the Court with defense counsel, and the exhibits made available to the Court when any agreements in return for cooperation have been made by the government, that quite obviously there were no agreements here with respect to Nancy Sauer's testimony.

I think the evidence is overwhelming that Nancy Sauer was candid, and her statement that she gave the defendant $10,000, which was income from prostitution, and that income from prostitution was given to the

defendant because he performed certain services for her, he provided her a place to stay, he gave her expense money, he paid for her attorneys when she was arrested on the four occasions between June and August, he paid her fines, he managed her, he was her pimp.

Certainly that money is given, therefore, in a business context.

With respect to demonstratring the defendant's wilfulness, the record is replete with testimony, and indeed on challenged testimony, that the defendant did conduct his life style in such a way that to avoid detection, and in such a way to prevent the government from gleaning any more information than we have gleaned.

The defendant's exclusive use of cash in those situations when a check would normally be the medium of exchange, the payment record of the apartment building indicates, and your Honor may examine it, the payments were made in cash, the rental payments were made in cash. Now often does one make cash payments to one's landlord?

The defendant's failure to maintain books and records has already been conceded by the defense. The defendant's use of an alias. There is no question, I think, from the evidence that the Court may conclude that Charles Dunbar and James Mitchell are one and the same person,

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orat a minimum conclude that James Mitchell adopted the name Charles Dunbar and the identity of Charles Dunbar as early as 1969, and used that identity at least until 1973 for the entire time of the leasehold at 145 Fourth Avenue.

The Court may conclude from an examination of the bank records that the signatures thereon of Charles Dunbar and James Mitchell are one and the same. The Court may conclude from the responses of James Mitchell to Officer Driscoll's questions that he in fact admitted to the world that he was Charles Dunbar.

The defendant's wilfulness may be shown from the fact that he lied to Special Agent Clarke. Special Agent Clarke asked him where he had filed, if indeed he had filed. The defendant quite blithely replied, "Oh, I filed in New York."

Counsel has conceded he filed nowhere.

Defendant claimed he had an employment which didn't exist. He claimed he was employed at Sony. Yet the Social Security Administration has no record.

Turning the Court's attention to the corporate shell, Mr. Pravda testified that Porcupine Productions was created in 1972, but Porcupine Productions was active in its effect upon the defendant's 1971 activities, because of the payments made in 1971 and 1972 were all part of one

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royalty payment. They were all part of one scheme of payment for the book, so although we can distinguish the $1,000 from the $2,000 for purposes of tax liability, for purposes of a general business scheme I think we cannot distinguish it.

With respect to the Rolls-Royce, again counsel has alluded to the defendant's mother. Doubtless he has a mother, but nowhere in the record is there any testimony about his mother.

There is, of course evidence, in the two bank records that a Donna Mitchel was inserted on those bank records as the defendant's mother, but of course that was inserted by the defendant, so doubtless that is as false as everything else he put on those records.

I think, your Honor, this case does not rise and fall, as counsel has suggested, on Miss Sauer's testimony. Rather it rises and falls on the otality of the evidence here, and I submit to the Court that the totality of the evidence proves beyond a shadow of a doubt the defendant's guilt on both counts of the indictment.

THE COURT: All right, gentlemen, I will reserve decision.

Can you get me the exhibits?

MR. PADGETT: Your Honor, there is one thing

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I would ask.

Defense counsel has in their possession certain 3500 material which was made available to them, and I would like it back.

THE COURT: Off the record.

(Discussion off the record.)

MR. PADGETT: Might an application be in order, if defense counsel wishes, to continue the defendant on bail, or whatever status?

THE COURT: I would grant it.

MR. SHERR: I certainly would so move.

THE COURT: Yes.

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| **Defendant** | | |
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- :

JAMES MITCHELL : 74 Cr. 265

Defendant :

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August 29, 1974,
4 P.M.

Before:

Hon. Richard Owen,
District Judge.

Appearances:

PAUL J. CURRAN, ESQ.,
United States Attorney for the Southern
District of New York,
Jerome L. Merin, Assistant U.S. Attorney.

STEIN & La GRECO, P.C.,
Attorneys for Defendant,
Richard C. Stein, Esq., of Counsel.

THE CLERK: USA v. James Mitchell.

THE COURT: I have just been handed a reply memorandum. Why don't I take a minute to read through it.

MR. STEIN: We would be grateful, your Honor.

THE COURT: You are --

MR. STEIN: I am Mr. Stein, substituted attorney for the defendant.

THE COURT: All right.

(Pause)

THE COURT: All right, Mr. Stein, go ahead, I will hear you now on this motion.

MR. STEIN: This is an application under Rule 33, your Honor, for alternative relief of either a new trial or a hearing for the purpose of granting a new trial. This is predicated upon the development of new evidence with reference to the activities of the defendant Mr. Mitchell as to whether or not the element of wilful intent in the crime of which he was convicted was in fact adequately presented to the court at the time of the defense during the course of the trial.

The affidavits which we have submitted in support of this application indicate that rather than wilful intent on the part of the defendant in this particular lawsuit, this defendant solicited the aid and assistance of

professional advice at all levels for the express purpose of trying to comply with the Internal Revenue Code and with the statutes as they existed.

At the time that he became involved in the publishing of a book he retained counsel and specifically retained counsel for the purposes of complying not only with all the proper business considerations that go into the formulation of a business venture and the operation of a business venture, but also to comply with any of the statutory requirements, whether they be administrative bodies or whether they be statutes themselves. And he solicited the advice of two attorneys who not only agreed to represent him, but organized a corporation for the purposes of pursuing this particular venture and took a participation in this venture.

I submit, your Honor, that this information is just item 1, that if the attorneys became involved in a corporation for the purposes of pursuing a business consideration, namely, the publishing of a book or any other activity, that they would have and should have complied with the law, whether it be a taxing authority or whether it be a licensing authority, or whether it be any type of consideration other than the normal business considerations of cash flow, etc.

So what I say is that at the time that he got involved with a law firm, a respectable law firm who does a good job and whom I have met in my travels, and I know them to be good as they have been adversaries of mine, there is no doubt in my mind that he didn't go to a candy store or a fly by night situation, he went to capable counsel for the purposes of creating a business consideration and a business venture that would properly protect his interests and his rights but would also comply. And their participation in this corporation is to my understanding an indication of evidence that this was a primary and principal intent.

THE COURT: You are talking now about Messrs. Faber and Golub?

MR. STEIN: That's correct, your Honor.

Subsequent to the learning of an investigation by the service with reference to the sanctions, the affidavit sets forth that he solicited additional advice and this time from another professional and this time for the purposes of conforming and complying with Internal Revenue Service. There is evidence that a check was given for the purposes of detention. This was as far back as May 10, 1973.

The affidavit has been submitted by counsel which is

not in support of this instant motion, but if anything I would say does not help our application. But in this particular affidavit submitted by trial counsel and by his prior counsel they concede that they were retained as early as May, 1973, for the purposes of determining any tax considerations, liabilities, deficiencies, or whatever it is, so that if any existed, it could be discussed and it could be disposed of.

This goes to intent because the law is clear that an indication by the defendant to offer to pay or be willing to pay would certainly go towards mitigating in terms of reasonable doubt, in terms of intent.

Now, he was always under the impression that the tax counsel that he had retained -- and he has said so in an affidavit -- was handling his case. Now, what could they have been doing with the Internal Revenue? There were no specific problems if I read the indictment correctly. We are a little bit hampered in that we don't have the record. One is the reference to a thousand dollars. Certainly tax counsel could have and might have been involved with Internal Revenue discussing whether or not there was a corporate problem or a personal problem, whether or not the corporate consideration was really reporting properly, recording properly or conducting his affairs properly. If it

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were to be charged back to the individual, fine, that is not fraud trying to evade the payment of taxes. If there is a determination by the IRS that there was a conflict as to how that transaction should have been held or how it should have been controlled or how it should have been reported or by whom, fine, but it could have been just charged back to the stockholder or it could have been rightfully that of a corporation. The fact of the matter is that if tax counsel were retained for the purposes of resolving his tax problems that means that with reference to that thousand dollars it was to be discussed, it was to be resolved and if in the event it was to be charged to him personally, he was ready, willing and able to pay it. And this should have been called to the court's attention, that counsel were retained for the express purpose of looking into these problems, of working with the IRS and determining is there in fact a wilful evasion. But no, counsel was retained to also defend the defendant in a criminal action. To defend the defendant might have meant that they would have to admit that they were either negligent or inept or embarrassed or whatever it may very well be that entered their thinking by not introducing this evidence to the court.

It is very clear to me that had they introduced to the court evidence either through the testimony of the

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IRS agent with whom they had the meetings as to whether or not they conducted meetings and the nature of the meetings, had they cross-examined Miss Hall intelligently and properly with reference to anything that she knew about the tax considerations which would obviate the desire or the need for him to try to avoid or evade taxes, this type of evidence and this type of information should have rightfully been brought to the attention of the court.

In Miss Hall's affidavit is a statement of a Mr. Edelman with whom my associates have conversed by phone, whom we have been unable to reach, who has further attested to the statements that are submitted in affidavit form and he will come forth to a hearing and testify that there was never any wilful attempt on the part of this defendant to avoid the payment of taxes. If attempts could be shown for him to initiate an offer to pay or determine what the differences are, to reconcile these differences, to determine whether or not he is properly charged, to determine whether or not perhaps this $10,000 that is discussed in the girl's testimony, that whether or not she was paying back a debt or whether or not she was paying for room and board or whether or not she had in fact given him a gift, I don't know but had these items been discussed in front of the court in forms of properly adduced testimony the court would have had

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additional information on which to render a verdict. And whether or not it goes to intent would to my mind -- it is clear that it goes to intent. And not to have brought this to the attention of the court through properly adduced testimony is a total and absolute failure and a derogation of the rights of this defendant.

This defendant was entitled to proper and adequate counsel. I am not going into the embarrassing situation of attacking another attorney. It revolts me. I am not interested in that. But the facts are the facts. These are the same attorneys who were retained for a certain purpose and that purpose was the nub and the thrust of this lawsuit, and that information should have been brought to the attention of the court and had you known it I don't know what your verdict would have been, but it could have been reasonable doubt, that there was no wilful intent.

There are sufficient cases cited in our affidavits and our memoranda to to indicate to us that had you known that defense counsel was retained prior to an indictment and was specifically ordered to go forward and get me off the hook on making a motion picture with the dealer interests, do what has to be done, maybe I am not liable, maybe it should have been a corporate entity, maybe the corporation didn't file a proper return and it was corporate income. What

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about expenses? Was a 1040 issued? Was there any income tax return submitted to the stockholder to declare that it is a dividend? Was there any information furnished to the stockholder by Golub, etc. to indicate that this is income that he should have reported.

Maybe there was, maybe there wasn't, but in any event certainly there is a difference between Mitchell and Porcupine and certainly if the Internal Revenue makes an allocation as to income, taxable income, it could have been resolved, it could be an honest or honest mistake, but that is not intent to defraud the government, not when you put attorneys in charge so that this probability and possibility is removed totally. This is removed, you are putting it in the hands of professional men who have a stake in this thing and are looking for a successful venture. How could you possibly feel that you are going to make a mistake of such a nature so as to be accused of wilfully defrauding the government? I can't conceive of it.

Why do you retain tax counsel immediately that you learn of a tax problem? Go in and find out what it is. If you are told, don't worry, it is resolved. I know if I tell that to a client that client doesn't worry, but he has stated that is what he was told, if it is going to be a question of testimony, fine.

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I would also like to hear what the IRS man has to say. What was the nature of his investigation? What was it that he was trying to determine? What information did he have that would make him believe this? And if this be the case, was it communicated to defense attorney? I think that he should have advised the court that he was retained far in advance of any indictment for the purposes of reconciling the problems which were the subject matter of this particular crime.

THE COURT: Let me hear from the government.

MR. MERIN: Thank you, your Honor.

Your Honor, would it be acceptable to the Court if I make my argument from counsel table?

THE COURT: Yes, of course.

MR. STEIN: May I sit over there so I can hear you, sir?

MR. MERIN: In which case I will move back.

If it please the Court, there is a return date of an order to show cause which the counsel has already told the court is an attempt to secure a new trial pursuant to the provisions of Rule 33 of the Federal Rules of Criminal Procedure. The government in its affidavit in opposition to defendant's motion has outlined its reasons and arguments why such a motion should not be granted and

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in sum intends that neither the requisite standards of Rule 33 have been met or even come close to being met by defendant's allegations, nor indeed that defendant's allegations go no farther than to indeed, if I may use a colloquialism, placethe defendant deeper in a hole than he was in.

Essentially the two affidavits of defendant Mitchell and Hall state some time in 1972, approximately six months after taxable year 1971, which is what the defendant is charged with -- that was the year violation the defendant was charged with -- some time in 1972 defendant Mitchell went to two attorneys for the express purposes of tax avoidance, meaning a new venture in the sale of his book, "Gentlemen of Leisure."

According to the Hall affidavit these matters were discussed rather extensively. Defendant didn't at any time in 1972 or 1973, April of 1973, file tax returns with regard to the 1971 year. Indeed, the retention of the firm of defendant Mitchell took place on May 9th or 10th, 1973, only after defendant's associate Susan Hall discovered from an interview with an intelligence agent of the IRS that Mr. Mitchell was being investigated for federal criminal income tax fraud. At this point Mr. Mitchell sought the advice of the law firm he now complains against.

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Your Honor, an affidavit was submitted by that firm and I see no point in getting into that argument, since frankly, the crux of the government's position is that there was neither negligence on the part of counsel nor is there newly discovered evidence since the sum total of the complaints of the defendant raises only one question, so what. And I think so what, your Honor, because the wilfulness which the counsel has argued extensively is a manifestation of the year 1973, which is two tax years beyond the year charged and a manifestation that defendant if anything discovered that he was under investigation. Defendant's wilfulness in the tax year in question or even in the year following that tax year are rather clear and were so adduced at trial.

Under the circumstances, your Honor, the government contends that there is no Rule 33 question here because there is no evidence which shows either lack of wilfulness or newly discovered evidence as to lack of wilfulness or indeed as to defense counsel's negligence, or worse, as is contended in the affidavit.

For those reasons, your Honor, the government respectfully requests this court to deny the defendant's application.

THE COURT: Mr. Stein, let me ask you a few

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questions -- and I don't want to cut you off in answering anything that you have heard.

MR. STEIN: I thought I might perhaps answer two specific observations by counsel.

THE COURT: You go ahead.

MR. STEIN: First of all, with reference to the period of 1971 being the taxable period, if and in the event it was determined that the liability was a corporate liability that corporate liability would have been reportable in '72 and it was in '72, during the course of '72 that Mitchell solicited legal advice. And if there is any reason for him to believe that there was a tax liability of '71 it would have been told o him at that time by his attorneys who he retained at that time in 1972 because the taxable period would have been April, '72, and if it were a taxable period due April, '72, and in fact he solicited advice in the middle of '72, if it was determined that it was a corporate liability by counsel then there was no need for him to file.

If he did file, right, it could have been determined -- if he had to file, rather, it could have been determined by his attorneys at that time for Porcupine. They were the ones who knew or should have known as to who was liable and what the liability was. And that would the

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nature of the observation that he tried to comply at the time, that in '72 when he formed the corporation it was for not only meeting tax obligations but also to carry on a business. But inherent in carrying on the business is compliance with the tax laws and this is what was done.

And so to thrust the '71 liability on him in '72 -- he consulted counsel. If it was their opinion that he was personally liable I am sure they would have advised him at that time. But in fact they might have or maybe did report that income in Porcupine for the time and period in question. Whether Porcupine was on a fiscal or calendar we have no way of knowing. Whether it was reported and how it was reported we don't know. Whether any moneys out of Porcupine given to the defendant were either a dividend or a salary or the repayment of a loan or just a lone we have no way of knowing. So the time frame does not mitigate against the defendant.

THE COURT: Let me ask you --

MR. STEIN: With reference -- just one more point, your Honor, if I may.

THE COURT: Go ahead.

MR. STEIN: With reference to the point it was only subsequent to an investigation being called to the attention of Miss Hall that counsel was retained, I should

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like to make certain that everyone understands that when counsel was retained to create Porcupine there was no reason to believe that Internal Revenue was involved in any way with Mr. Mitchell in terms of any tax evasion and in only the subsequent year when she learned of it and then she had reason to believe that perhaps a deeper involvement was in the problem of Mr. Mitchell other than royalties on a book and called it to his attention, it was at that time that he tried to determine what these probabilities or what this debt could be or what the investigation could be about.

If the investigation was only with reference to Porcupine for the royalties on the book, he had already taken care of that. But now learning that perhaps it was something else, he now retained additional counsel, he now retained additional counsel for just those purposes, to find out the depth of his investigation and whether or not it could not be resolved as a businessman's problem, whether its corporate income or personal loans or gifts or all the different exigencies that go into the operation of a business. He could have borrowed money for the business, he might have obtained a loan, he could have a thousand different ways to have that transaction treated by the corporation.

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THE COURT: Let me ask you, the question of dates here I think is much more important than you have given weight to and I say that for this reason. Mr. Mitchell's affidavit on this motion indicates that in the year 1971 he had not received any money on account of this book. Miss Hall's affidavit, on the other hand, in line with her trial testimony indicates that in the summer of '71 she had already given him a thousand dollars personally.

Now, aside from the inconsistencies in the affidavit, Mr. Mitchell taking the position under oath that he didn't receive this money --

MR. STEIN: I can explain that, your Honor, if I may.

Very frequently in your experience and in mine we have known corporations to be formed on behalf of one individual. Many a time we enter into contracts --

THE COURT: No, no, you are off my point. My point is he got a thousand dollars in the summer of '71from Susan Hall on account of this book and he does not acknowled that in his affidavit.

MR. STEIN: Except it might be that if he physically receives a thousand dollars on the corporate books it forms book --

THE COURT: The corporation was not formed.

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MR. STEIN: It does not have to be formed, your Honor. In order for income to be reflected on a corporation at a subsequent date to be formed on behalf of a single individual, we have done it many a time where an individual has given five or ten thousand dollars for the purchase of stock and eventually it was put into the corporation.

THE COURT: Mr. Stein, a lot of things could have happened.

MR. STEIN: I say that is what happened here.

THE COURT: As a matter of fact, Miss Hall on this trial, the most reluctant of witnesses --

MR. STEIN: I understand.

THE COURT: -- testified that she gave the defendant a thousand dollars in cash in the summer of 1971, and if my memory serves me Mr. Pravda announced that the existence of the instrument in '72 in which that was endeavored to be put under the corporate umbrella after the corporation was formed, but in any event at the time that thousand was paid in '71, there was no corporation in existence, there was no Pravda, there was no Golub. Now, there was a duty in regard to reporting that plus the $10,000 in April of '72 for tax purposes. The first date anybody has here of anybody going to a lawyer is in July, which is three months after, and I am asking you how that

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is relevant to his state of mind in April so as to require me to set aside a trial.

MR. STEIN: It is my contention, your Honor, that inasmuch as he was dealing with a woman who was far more sophisticated in money matters than he, at her suggestion and advice they went to counsel three months after the April date when he should have reported it. The fact that he went to counsel and at that time a resolution might have been made or should have been made or could have been made that the creation of this umbrella would provide for that revenue -- that the check was given to him personally, I am not going to discuss at this moment, but whether or not it should be charged to him as income and revenue or whether or not it should have been charged to the corporation inasmuch as --

THE COURT: No, it is a question of whether in April of '72 he should have put down that he got $10,000 and a thousand dollars from Susan Hall. And what I am asking by going to lawyers in July how that set up the corporation for future moneys for Porcupine, how that bears on his state of mind in April.

MR. STEIN: I don't think that to form a corporation in July, three months subsequent to April, of necessity is a vehicle for future transactions. There is no question

that if it is set up for one purpose and one purpose only, namely, this particular book, if this was the beginning of the book, then any transactions prior to that particular formation of the corporation, of a corporate umbrella could be incorporated in that corporation.

THE COURT: Of course, there is no question on this record that no claim is made whatsoever that he sought any advice with regard to what to do with the $10,000 of Nancy's salary.

MR. STEIN: I have no information as to that, your Honor. With reference to that, I don't know the nature-- as I said, I haven't seen the record -- but I don't know the nature of the transaction. It might be-- I don't know the nature of the cross-examination, or the representations made to the IRS when the problem came up if counsel was working with them -- but if the cross-examination were to the effect that this was in repayment of a debt or the cross-examination were in effect that this was perhaps a gift, or that this cross-examination were in effect that this money was for the purposes of let's say contributing towards household expenses, if any of this testimony had either been told to the IRS at the time that they were investigating it, or brought forth at the trial, then it certainly would have impressed the court and it

should have been adduced at that time.

THE COURT: All right. Anything else?

MR. STEIN: Not at the moment, your Honor.

THE COURT: Now, I have listened very carefully to arguments of counsel. I have considered very carefully the briefs, the affidavits that have been submitted and I deny the motion. In my opinion Rule 33 requires a new trial in this circumstance based upon newly discovered evidence that would have an effect upon the outcome.

Those requirements include the following: the evidence must have been discovered since the trial, the failure to produce it at the trial must have been due to other than a lack of diligence, must be material to the issues and it must be of such a nature that it could probably produce an acquittal in the event of a retrail.

Now, applying those standards, I do not find that they are met. The evidence was available to the defendant both before and during the trial and was not newly discovered. In that regard I am persuaded by Susan Hall's affidavit in the motion for a new trial in the very last paragraph in whichshe says "If I had been afforded an opportunity to testify to these matters at trial I would most certainly have done so."

Now, on the trial Miss Hall, represented by

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separate counsel, made every effort to avoid giving any testimony whatsoever, and in addition to her own counsel objecting to virtually every question, defendant's counsel objected to many, many questions that were asked of her. I do not credit, therefore, the alleged opportunity she says she wished she had because it was there, if she had chosen to accept it, and if defense counsel had chosen to press upon her a waiver of a relationship which she asserted as a journalist, which you may be aware I denied during the course of the trial.

Now, even passing the issue of when this evidence was discovered, I find this is even at best relevant to the defendant's intent in late '72 and '73, which is long after April 15th of '72, the period that I regard as relevant in this action, and would have no bearing in my opinion on the outcome of this trial.

It deals with a payment of a thousand dollars in July of '71 which Mr. Mitchell denies in his affidavit, and as I say the date for reporting that for the defendant was '72. Mr. Pravda was consulted in July and Mr. Werner consulted in May of '73.

Also the fact is, and it is not disputed before me either in the affidavits or on this argument, that the proffer with regard to attorney's consultation relates solely

to the payments from Susan Hall and in no way affects the evidence that was given here regarding payment of approximately a thousand dollars to the defendant from Nancy Sauer who was a prostitute working for him, and that evidence unchallenged on this motion is by itself sufficient to sustain a conviction.

In addition, I want to say, having carefully studied this record and having sat as the judge and trier of the fact on this case, that I regard the failure to raise these issues on the trial as the product of a defense strategy that having been unsuccessful is now attempted to be avoided. I saw the strategy of this trial from the vantage point of its conclusion.

The strategy basically consisted of three things: 1, to attack the credibility of Miss Sauer; second, to endeavor to have Miss Hall avoid testifying; and, third, for the defendant to stay off the stand because he was too vulnerable on cross-examination. That strategy having not availed it is my judgment that this is an effort now to circumvent that failure.

I might say that during the course of the trial we held a hearing in which the good faith of the prosecution was raised. I denied that summarily. There was utterly no evidence to support it after a hearing.

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We are now faced with a post-trial motion in which the good faith of his own counsel was attacked, and I am sure the coincidental nature of the strategy in these two regards is not to be overlooked.

As a consequence the motion is denied.

I am now prepared to sentence.

MR. STEIN: I respectfully would suggest to the Court that before sentencing if we could possibly have a transcript of the court's decision with reference to this denial of the instant motion I should like to move to reargue it and perhaps have an opportunity to comply with some of the thoughts that you expressed in reference to arriving at this decision. It came rather swiftly and I was not able to stay with it totally; but perhaps a slight adjournment would permit me to submit some answering affidavits or memoranda with reference to the court's decision in particular as to whether or not evidence of proper repayment is admissible on a trial of this nature. And to the extent that it goes towards wilful intent I would like to pursue that far more diligently if I may.

THE COURT: Mr. Stein, I don't feel more time is necessary.

My law clerk tells me in referring to Nancy Sauer I referred to Nancy Sauer. I referred to the sum of

$1,000 instead of $10,000.I intended torefer to her testimony as given which involved $10,000, not $1,000.

Now, I take it the government is ready for sentence.

MR. MERIN: Yes, your Honor.

THE COURT: Aside from the extension of time you requested with regard to my opinion, Mr. Stein, I take it you are otherwise ready for sentence.

MR. STEIN: I imagine so, your Honor.

THE COURT: All right. Now, does the government wish to be heard?

MR. MERIN: Your Honor,the government at this time will rely on the report of the Probation Department.

THE COURT: All right. Mr. Stein, I will hear you.

MR. STEIN: Your Honor, to be perfectly honest I have not had that much of an opportunity to speak with the defendant with reference to the recommendations to the court as to sentencing in that I was away on vacation during most of the period of the preparation of these documents and I really could not in good conscience make any recommendations to the court without properly interviewing the client.

THE COURT: Well, were you not aware of the second page of the order to showcause that adjourned the

sentence to today to this hour?

MR. STEIN: Yes, but I do not have sufficient information, your Honor, with reference to making recommendations to the court.

THE COURT: I don't understand why not. In preparing for this motion, and the motion and the sentence come on together, I am at a loss to understand you are not.

MR. STEIN: Well, your Honor, we didn't expect a decision from the bench today. We had reason to believe that you might very well reserve decision and we certainly were fully hoping to have a decision submitted subsequently and perhaps even be afforded if we didn't prevail to either reargue it or to appeal it. And to have a decision from the bench comes to me as a total surprise at this moment. I didn't prepare for any eventuality subsequent to that.

MR. MERIN: Your Honor, under the circumstances, the government might have an application to make to the court in the event of a delay.

THE COURT: All right.

(Pause)

THE COURT: Mr. Stein, I am going to deny your application in view of the fact that the order provided that sentencing was to be at 4 o'clock today unless otherwise provided by the court.

MR. STEIN: I'm sorry, I didn't hear it.

THE COURT: I say, my order provided that sentencing was to be at 4 o'clock today unless otherwise provided by the court and therefore I feel you have been on notice of the fact that sentencing would come on. Now, notwithstanding your earlier position, do you have anything you wish to state on behalf of the defendant?

MR. STEIN: If your Honor would grant me a short adjournment of some five minutes or so to permit me the opportunity to speak to the defendant.

THE COURT: I will be delighted to do it. We will adjourn to 5 o'clock for sentence.

(Recess)

THE COURT: Now, Mr. Stein.

MR. STEIN: Prior to addressing myself to the sentencing, your Honor, I had an opportunity to discuss with the defendant in the hall as to this crucial period which your Honor has spotlighted and pinpointed of the April 15th until the July period of the actual retention of counsel, and the defendant advises me that as early as December of '71 and during the entire year of '72 he was meeting with Golub and had discussions with Golub with reference to this particular transaction of abook and royalties and it was during this year that all the

discussions took place as to the formation of the corporation and the participation of Golub. I just heard that in the hall this moment. I don't know if that type of testimony by Mr. Golub in confirmation of the statement I made baldly to you at this moment would be of consequence to you in making your decision.

THE COURT: Yes?

MR. MERIN: Your Honor, if I may be heard, first of all Mr. Golub's testimony on that subject would be hearsay. The appropriate one would have to be Mr. Mitchell who had a chance to do so.

Secondly, I refer the court to the whole second paragraph, page 1, which would be difficult because Miss Hall states on or about the 1st of December, 1971, she was introduced to Mr. Mitchell because he might be the good subject of a book.

The government has nothing more to add.

MR. STEIN: I beg to differ with counsel. It is clear in my mind that if the court were to find at a hearing by independent testimony that prior to April 15th the problems were discussed and taken up with counsel with reference to the thousand dollars and whether it is a corporate obligation or corporate income I think the court might reconsider its decision.

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THE COURT: In light of Miss Hall's affidavit-- and I am also looking at the second page -- I deny your application.

Now, let us go to whatever you would like to say.

MR. STEIN: Your Honor, if I can submit an affidavit from Mr. Golub that there were meetings prior to this July 17th retention would that be of any service and assistance to the court?

THE COURT: No, I decline to do this. Mr. Mitchell could have put this in his earlier affidavit and this in no way touches the testimony of Nancy Sauer, which, of course, would be the heart of the conviction. I deny your application.

Now, what would you like to speak to me about with regard to sentencing?

MR. STEIN: I would like to speak to you about the Sauer consideration for a few seconds if it isn't an imposition on the court.

THE COURT: I decline to hear you further. Go ahead.

MR. STEIN: The defendant advises me, your Honor, that he has absolutely no record of any criminal conviction or any criminal activity and I relate this to you on the

basis of the few minutes that I had with him in the hall, and that this would be the first offense of which he has been convicted.

He has further advised me that he is presently gainfully employed and that he is working for a firm called Stonehill Productions as an author writing a book or in the midst of a second book and that he is being considered with reference to a motion picture where he would be an actor in the picture.

I have very little else to offer other than he is a high school graduate, not fully cognizant of the business world, not fully aware of the ramifications of the publishing industry, the entertainment industry, as such, which is a very intricate and very involved and very technical business and which I have had prior experience with actually.

His involvement with reference to this publication is one of a naive individual getting involved in an industry or a business consideration where he just doesn't know his way around. And perhaps he did try to take advice from Miss Hall -- and I think he did -- and I think he did try to get counsel to give advice and be of assistance to third parties.

I don't believe my argument on the Rule 33 motion

can be ignored. The fact that this man did go through and tried to elicit professional assistance immediately that he learned that this type of assistance was necessary, whether it's been to form a corporation -- I am sure this man never even knew what a corporation was or the variances between corporations and individuals or what royalties were -- I am positive that ramifications of an Internal Revenue investigation are far beyond the comprehension of this individual.

So the fact that intent was such an integral part of this particular conviction and we have attacked it, and we feel -- we were hoping that it was a successful attack in that we are firmly convinced that he really tried to comply, he really tried to comply. We are convinced -- that he failed is apparent, but that he failed is almost shameful.

I think these are items that if the court would take into consideration in determining the sentence would have no hardship on the people, but would take into consideration the particular circumstances here.

THE COURT: Mr. Mitchell, would you like to say anything at this time on your own behalf?

THE DEFENDANT: No, your Honor.

THE COURT: Let me say this: I have been thinking

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about what you have been saying here in terms of assistance from attorneys with regard to these matters and I believe it to be fact, although it is not really terribly relevant, that the reason he was occasioned to go to lawyers was, if I can borrow a phrase from the securities field, because he was going public. He had a book about him, he was going on the air, he was going on television and money was coming in not from the Nancy Sauers of this world, which were private, but from royalties where the money had to be accounted for. And I think I am confirmed in that because the only matter in which he ever went to counselate as he did with regard to these matters was public disclosure could not be avoided.

For example, in August of '73 he was on CBS television at which time he told a Mr. Schaefer, Mr. Schaefer related in his presence, and he said "This man claims to earn as much as the President, $200,000 a year." Mr.Mitchell sitting there right beside him didn't indicate to deny that.

On June 10th of '73 he was on the radio in the Jim Gash program where he was asked, "Would women make a good deal of money?

"A I believe there are good times and bad times.

"Q Some of them I believe made 70,000 a year?

"A I am sure that occurred.

"Q Do they give all this money to you?

"A Yes.

"Q Every nickel of it?

"A Yes."

So it was as to matters of this book and things of that nature in my opinion that put him in a position where he had to protect himself against obvious notoriety with the Internal Revenue which had never occurred before.

So as a consequence, I conclude as follows: the sentence of this court on count 1, which is a felony, is three years in the custody of the Attorney General with a $10,000 committed fine and the costs of prosecution.

On count 2, the term of one year to be served concurrently with a separate and an additional $10,000 committed fine and the costs of prosecution.

Does the defendant have any applications, or the government?

MR. MERIN: Yes, your Honor, at this time the government would like to make an application to have defendant remanded. The argument of the government in the case of remand is as follows: Your Honor, under the circumstances there is a great danger of flighr or absconding by the defendant Mitchell. The defendant Mitchell throughout

the trial has shown he has no roots, real roots in this community. He has lived the life style of a pimp, a man who has drifted from woman to woman, from place to place, a man who by his own admission has either gone through several fortunes or has a large sum of money some place, particularly when he is facing three years' imprisonment as well as $20,000 in fines plus the cost of prosecution, plus any civil penalty which the United States Government may levy on his taxes.

There would be a great difficulty in finding this defendant. He has no roots. He, however, is familiar with several areas of this county, and indeed his testimony at trial, I believe, showed that he had met one of his prostitutes Nancy Sauer in Montreal in Canada, so it can be concluded that the defendant was not only familiar with the United States but also with the Montreal area.

The defendant has throughout these proceedings since indictment made every effort to avoid conviction by his various accusations at trial against his own defense attorneys.

As to his record, one of the arrests is a significant one in that it was an assault on a police officer.

There was testimony before the grand jury, and since I was not present at the trial, however, I will have to

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leave it to your Honor's recollection. But Nancy Sauer, according to my information, gave testimony to the effect that the defendant had beaten her when she had tried to leave him. And Roosevelt Bell gave testimony or gave information to the government to the effect that Mr. Mitchell used force and violence to keep his women in line.

With regard to the defendant's instability the government would also point out that the defendant had been under two nicknames, Porky and Silky and under an alias of Charles Dunbar.

The government contends in sum that not only does the defendant face a great temptation to flee jail, but that he either has the resources to make that temptation available and even more desitable, or he had gone through several fortunes that indicates the life style which is one of lack of stability. In either case there is evidence to show lack of stability of a person who will not face up to his problems and who the government contends will not be here when the time comes to surrender.

In one of the articles, I believe the New York Post magazine article which is based on the serialized version of Mr. Mitchell's book, Mr. Mitchell admits to carrying a gun.

Throughout Mr. Mitchell's career, throughout his

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writings, his interviews, indeed everything we know about him, your Honor, Mr. Mitchell has manifested not only a contempt for society, but a lack of willingness to comply with each and every requirement that society imposes upon its members.

Furthermore, your Honor, I have been informed by the attorney who is handling this matter that Mr. Mitchell is likewise still liable for further and future prosecution on related matters and that he is being actively considered by the Department of Justice. Such prosecution has been withheld in order not to prejudice the defendant's rights with regard to the present trial.

Under the circumstances, your Honor, the government will ask that the defendant be immediately remanded, or if not, that he be held in a higher bail, $75,000 surety.

THE COURT: Mr. Stein, let me hear from you on this. The standard, of course, is what you believe --

MR. STEIN: We firmly believe we should be able to file within a few days.

THE COURT: No, it is a question of what you believe are meritorious grounds for appeal, because if there are no merits on an appeal there is no basis for continuing the defendant on bail.

MR. STEIN: I think in the first instance, your

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Honor, we are seriously considering on the whole of appealing your Honor's decision as to our Rule 33 application.

THE COURT: I assume they would all go up at once.

MR. MERIN: Yes.

MR. STEIN: Right. And that in itself caught us by surprise, the decision rendered from the bench.

And with reference to the conviction itself, we feel that the matters contained in the application under Rule 33 are sufficient to go forward on an appeal. We have not the benefit of the record -- of the court record during the course of the trial and we have been unable to pursue that.

But if I might suggest, your Honor, that you continue bail. As it is, the defendant has always appeared with reference to any appearances that became necessary in front of the court. He has always responded to our phone calls and our requests for him to come to the office for our interviews or to prepare affidavits and so on.

Contrary to the U.S. Attorney's office, we have found him to be particularly cooperative and there is no reas to believe that he is about to leave. In fact, our plans are with reference to an appeal, and to remand him today over the holidays for a few short days I see no useful purpose being served.

THE COURT: I am going to order the defendant remanded. This, Mr. Stein, gives you the opportunity obviously on Tuesday to go to the Court of Appeals for the relief there which includes among other things either their determination on what your appellate posture is, granting such bail you feel is appropriate under the circumstances and setting an expediated appellate schedule. So the defendant is remanded.

MR. STEIN: Your Honor, if I may, with reference to your Honor's decision to remand, we came here totally unprepared, as I said now twice, and I don't like the idea of repeating myself, but he has not set his affairs in order. He came here totally unprepared to be remanded. I certainly feel the question of a few days would not prejudice the government or the court. We would be talking about a period of a day or two if it were the normal business days. However, we are talking about a long holiday with reference to the Labor Day period which nowcomes up.

The passport of the defendant has been picked up by the U.S. Attorney. He surrendered. The possibilities of his leaving the jurisdiction of the country are remote. But just to remand him over the holidays when he really didn't come in today to be sentenced or remanded -- and we have every reason to believe that we have raised sufficient

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issues for the court to consider and that there would be a reserved decision before we would learn of the disposition of the matter. So to remand him today would create a hardship which I feel could be alleviated in light of the fact that our appeal, as I indicated, will be predicated upon this motion, also on the credibility of the witness who testified at the trial, and we have every reason to believe that it probably would be permitted and granted. To set this over until Tuesday or Wednesday I feel would not be any undue hardship or create any prejudice.

MR. MERIN: Your Honor, I have only one thing to add which I would like to put on the record and this is one of the bases for the government's motion for an immediate remand. I have been informed by agents of the Internal Revenue Service that in the course of this investigation a subpoena was served on a Janet Milanczak and the defendant in a motel in Manhattan where they were abiding and thereafter both the defendant and Janet Milanczak disappeared. Janet Milanczak I do not believe has been heard of since.

THE COURT: The defendant is remanded.

--

THE FOREMAN: There is a quorum present.

N A N C Y S A U E R, called as a witness by the Grand Jury, being first duly sworn by the Foreman, testified as follows:

EXAMINATION BY MR. PADGETT:

Q Miss Sauer, you have appeared before this Grand Jury in the past, have you not?

A Yes, I have.

Q At that time, I explained to you your rights, did I not?

A Yes.

Q Subsequent to that time, you have consulted a lawyer, have you not?

A Yes, I have.

Q In fact, he is standing right outside, Mr. Herman, is that right?

A No, Mr. Herman went on vacation.

Q There is another Mr. Herman outside, isn't there?

A Yes.

Q He is an attorney?

A Yes.

Q Miss Sauer, let me tell you your rights again. Miss Sauer, under the United States Constitu-

tion, you have an absolute right to remain silent. You need not tell us anything you do not wish to. However, if you do wish to tell us anything, it will be taken down by this gentleman to my right. It will be typewritten. And it may be used against you or against anyone else in a courtroom proceeding, in an administrative proceeding, a proceeding of any kind whatsoever.

Do you understand that?

A Yes.

Q You also have an absolute right to an attorney, a lawyer, either one of your own choosing or if you cannot afford one, one will be provided for you by the Government free of charge.

Do you understand that?

A Yes, I do.

Q My name is Padgett. I am a special attorney with the Department of Justice.

This Grand Jury has been convened and has subpoenaed you to testify in the investigation of the United States of America versus John Crawley and others including James Mitchell.

A Excuse me. Who did you say first, John --

Q John Crawley and others including one, James Mitchell.

This Grand Jury is investigating the financial activities of men such as John Crawley and others including James Mitchell.

When you last testified, I asked you certain questions, did I not?

A Yes, you did.

Q You gave us certain answers, did you not?

A No, I pleaded the Fifth.

Q In effect, your answers were that you refused to answer on the grounds that it might tend to incriminate you, is that correct?

A Right.

Q Miss Sauer, will you tell us your full name for the record, please?

A Nancy Sauer, S-a-u-e-r.

Q Miss Sauer, in pleading the Fifth, you had the advice of counsel, did you not?

A Yes, I did.

Q Since that time, you have spoken to your lawyer, have you not?

A Yes, I have.

Q You spoke to him, in fact, this morning, did you not?

A Yes, for a minute.

Q Did he show you certain documents?

A He was starting to just when I was coming in.

Q You have to speak clearly and loudly.

A Yes, he showed me a piece of paper, but I didn't read it.

Q Did he explain to you what it was?

A No.

Q Would you like to step outside and speak with your lawyer right now and have him explain to you just what that document was?

A Okay. Right now?

Q Right now.

A Excuse me.

(Witness excused.)

N A N C Y S A U E R, resumed the stand and testified further as follows:

EXAMINATION (cont'd) BY MR. PADGETT:

Q Miss Sauer, have you again spoken with your attorney, Mr. Herman?

A Yes. He showed me this piece of paper and he said -- I didn't have time to read it, but he said it was to grant immunity, but I don't know what it is.

Q You don't know what that is? Would you like to go outside and have Mr. Herman explain to you what it is?

A Okay.

(Witness excused.)

N A N C Y S A U E R, resumed the stand and testified further as follows:

EXAMINATION (cont'd) BY MR. PADGETT:

Q Miss Sauer, you have spoken to your attorney again, have you not?

A Yes, I did.

Q Did he explain to you what the piece of paper he showed you meant?

A Yes, he did.

Q Do you understand it now?

A Partly, yes.

Q Would you like to go outside and talk to your attorney until you understand it completely?

A I understand it, but -- yes, I do.

Q You do?

A Yes.

Q Miss Sauer, I am going to read the order of the court to you. It is entitled "United States District Court, Southern District of New York."

Is that the piece of paper you saw outside? Did it say that at the top?

A I didn't read it.

Q You didn't read it at all?

A No.

Q You didn't look at it at all?

A I just glanced at it.

Q Let me ask you this, Miss Sauer:

Do you know James Mitchell?

A Yes, I do.

Q How long have you known him?

A I met him about two years ago.

MR. PADGETT: Excuse me a minute.

Would you step outside, please.

(Witness excused.)

N A N C Y S A U E R, resumed the stand and testified further as follows:

EXAMINATION (cont'd) BY MR. PADGETT:

Q Miss Sauer, we just stepped outside, did we not?

A Yes, we did.

Q You just spoke to your attorney again, did you not?

A Yes.

Q Before we left, I asked you a certain question.

A Yes.

Q And you gave me an answer. Would you like to reconsider your answer?

A I plead the Fifth.

Q What does that mean?

A It means I will not answer on grounds it will incriminate me.

Q Is this after consultation with your attorney?

A Pardon me?

Q Is this after speaking with your attorney?

A Yes.

Q The Grand Jurors ask that you speak up so will you please speak a little louder.

Are you a prostitute?

A I plead the Fifth.

Q What does that mean?

A It means I will not answer on the grounds it might incriminate me.

Q Is that after having discussed the matter with your attorney?

A Yes.

Q If I ask you any further questions about James Mitchell or about prostitution or about pimps, will you give me the same answer?

A No, I will plead the Fifth.

Q You will give me the same answer to each question, that is to say, you will plead the Fifth?

A Yes.

Q Is that what you are saying?

A Yes.

Q Miss Sauer, let me read to you at this time the full order of the court.

"The United States District Court, Southern District of New York. In re: Nancy Sauer, a witness before the Grand Jury.

"On the application of Paul J. Curran, United States Attorney for the Southern District of New York, filed in this matter on August 3, 1973, and it appearing to the satisfaction of the court, 1, that Nancy Sauer has been called to testify before the Grand Jury of the United States presently empaneled within this district and, 2, that Nancy Sauer has refused to testify on the basis of her privilege against self-incrimination and, 3, that in the judgment of the said United States Attorney, the testimony from said, Nancy Sauer, may be necessary to the public interest and, 4, that the aforesaid application filed herein has been made

with the approval of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice pursuant to the authority vested in him by 18 USC 6003 and 28 CFR 0.175.

"Now, therefore, it is ordered pursuant to 18 USC 6003 that the said, Nancy Sauer, give testimony which she refused to give on the basis of her privilege against self-incrimination as to all matters which she may be interrogated before said, Grand Jury.

"This order shall become effective only if after the date of this order the said, Nancy Sauer, refuses to testify or provide other information on the basis of her privilege against self-incrimination.

"Dated, New York, New York, 3rd of August, 1973," and it is signed by Robert J. Ward, United States District Judge.

Do you understand that order?

A Yes.

Q Have you discussed that order with your attorney who is standing outside?

A Yes, I have.

THE FOREMAN: Talk louder, please, because they all have to hear you back there.

THE WITNESS: I'm sorry.

Q Is it a fact, Miss Sauer, that you had been called to testify before this Grand Jury?

A Yes.

Q And it is a fact that on that occasion you refused to testify?

A Oh, the other time, you mean?

Q Yes.

A Yes, I pleaded the Fifth.

Q Is it a fact earlier today you refused on the same basis?

A Yes, that's true.

Q I ask you again, Miss Sauer, do you know James Mitchell?

A I plead the Fifth.

Q What do you mean by that?

A It means I will not answer because it might incriminate me.

Q You understand, Miss Sauer, that you have been ordered bythe court?

A Yes.

Q Are you a prostitute?

A I plead the Fifth.

Q Is James Mitchell a pimp?

A I plead the Fifth.

Q When you say "I plead the Fifth," do you mean that you refuse to testify on the basis of your privilege against self-incrimination?

A That's true.

Q You do that despite being ordered by the court to testify?

A Despite it?

Q Despite it, yes. Even though the court has ordered you to testify, you are refusing.

A That's my privilege, isn't it? That I don't have to?

Q Miss Sauer, would you like to step outside and discuss this matter with your lawyer?

A I'm sorry, I don't think I understood your question.

Q I asked you if you refuse to testify despite the fact that the court has ordered you to testify.

A Isn't that why I'm pleading the Fifth for? Isn't that my -- is that what you are saying?

Q What I am saying --

A The reason I won't testify is because I'm

pleading the Fifth.

Q Is that your reason for not testifying, that you are taking the Fifth?

A Yes.

Q You are taking the Fifth, that is to say, you are refusing to testify on the grounds that it may incriminate you?

A Right.

Q Even though the court has ordered you to testify?

A Yes, but that's my privilege, isn't it?

Q Answer my question first.

A Yes.

Q Will you go outside, please, and discuss this matter with your lawyer. You understand that by the court ordering you to testify, it has conferred a certain degree of immunity upon you?

A And are you offering me that?

Q By order of the court, immunity is granted to you, something called use immunity, which you should discuss now with your lawyer.

A We have discussed it already.

Q After discussing this with the lawyer, you refuse to answer?

A No, he told me to accept immunity and answer you.

Q Would you step outside, please.

A Yes.

(Witness excused.)

N A N C Y S A U E R, resumed the stand and testified, further as follows:

EXAMINATION (cont'd) BY MR. PADGETT:

Q Miss Sauer, have you again spoken with your lawyer?

A Yes, I have.

Q Speak up.

A Yes.

Q Did he give you certain advice?

A Yes, he did.

Q Previously, Miss Sauer, I had asked you certain questions, after having read to you the order of the court, is that right?

A Yes.

Q In response to my questions, you answered that you were invoking your privilege against self-incrimination, that is to say, you were taking the Fifth Amendment, is that right?

A Yes.

Q Have you discussed that particular issue with your attorney?

A Yes.

Q I ask you again, do you know James Mitchell?

A This is after I have been given immunity?

Q This is after the order of the court has been read to you.

A And that means I have been given immunity?

Q Miss Sauer, you have an attorney outside.

A But apparently I don't know what's happening. He told me that you have granted me immunity. I am just asking you if you have. And if you have, I will answer, but I don't know if I have been granted it.

Q I don't think you quite understand my position and your attorney's position. My position is not to advise you. It is your attorney's position to advise you.

A But he has advised me.

Q What did he advise you to do?

A That you are going to grant me immunity. Now I don't know if you have. You haven't -- you read the order.

Q Did he tell you that I granted you immunity?

A No.

Q Will you please step outside and talk about

this with him?

A Yes.

(Witness excused.)

N A N C Y S A U E R, resumed the stand and testified further as follows:

EXAMINATION (cont'd) BY MR. PADGETT:

Q Miss Sauer, have you again spoken to your lawyer?

A Yes, I have.

Q Has he explained all the legal ramifications --

A Yes, he told me you have given me immunity.

Q Did he explain to you what immunity was?

A That you can't prosecute me against anything I say.

Q The type of immunity which has been applied for by the Department of Justice and which has been granted by the -- in effect has been granted by the order of the court is that nothing you say in this Grand Jury may be used against you. That does not mean that if there is an independent investigation which does not either relate to or flow from the information obtained in this Grand Jury, that you could not be prosecuted by that independent investigation. But nothing you say here may be used against you.

Do you understand that?

Q Where did you go?

A I came down to New York.

Q By yourself?

A Yes.

Q When you left your home to spend the weekend with your sister, did you bring any luggage with you?

A Yes, I had a little bit, yes.

Q How much?

A I guess enough clothes for a few days.

Q Enough clothes for how many days?

A I guess about -- every time I go on a trip, I always overload. So I knew I was only staying the weekend, but I had enough clothes, I guess, for about a week.

Q You had enough clothes for about a week?

A Yes.

Q How many bags did you have?

A I guess only -- let me think. I think one suitcase and one little bag.

Q The little bag contained your cosmetics and jewelry?

A Yes.

Q And the suitcase contained your clothing, is that right?

A Yes.

Q How much money did you bring with you?

A Not too much. I guess about $100.

Q I'm sorry.

A About $200.

Q About $200 Canadian?

A Where to, Montreal?

Q The money you brought with you was Canadian money?

A Yes.

Q How were you employed in Toronto?

A I wasn't at the time.

Q I'm sorry.

A I wasn't at the time.

Q When had you last been employed before the trip?

A A few months before.

Q Doing what?

A I was working in a store.

Q Which store?

A I can't remember.

Q What were you doing exactly?

A I was a cashier.

Q What was your salary?

A It was about $65 a week.

Q Did you pay your parents any rent?

A Yes.

Q How much?

A $20 a week.

Q Did you pay them that money after you lost your job?

A No, because I didn't -- I was in a bad spot and I didn't have that money, you know.

Q Did your parents give you any money?

A Yes, if I need it.

Q How much would they give you?

A It depends on how much I need.

Q Where did you get the $200 from?

A I had it saved.

Q You had it saved?

A Yes.

Q How long had you worked as a cashier?

A A few months.

Q How many months?

A About six.

Q What had you done before that?

A I was going to school.

Q Is that the first job you ever held?

A No.

Q Was that the first long term job you held, full time job?

A No, because before that I was working in an insurance company.

Q How long were you in school?

A Till I was 17.

Q I'm sorry.

A Till I was 17.

Q So the job in the store as a cashier was not your first job after you left school?

A No.

Q The insurance company job was your first job?

A Yes.

Q How long did you work for the insurance company?

A Almost a year.

Q So you worked for about a year and a half for those two jobs?

A Yes.

Q For how long were you unemployed?

A Just a few months.

Q How many is a few?

A About three or four.

Q About three or four?

A Yes.

Q You are telling this Grand Jury that after working for a year and a half, a 19 year old girl who had been unemployed for three or four months had $200 left?

A Yes.

Q You were not a prostitute then, were you?

A When? Up in Canada?

Q Yes.

A A little.

Q What do you mean a little?

A Well, after I couldn't get work, I had to raise money.

Q I'm sorry.

A When I can't find a job, I had to make some money, right?

Q You didn't have a job for three or four months, correct?

A Right.

Q So you were a prostitute for three or four months, correct?

A Yes.

Q How many tricks did you turn during that period?

A I can't remember.

Q How often did you turn tricks?

A I just did it when I needed the money.

Q How often did you need money?

A Whenever I -- I don't know. Whenever I needed it. Whenever I saw a new dress I wanted or something like that.

Q Did you work on the streets?

A Yes.

Q Did you have a pimp?

A Where, up in Canada?

Q Yes.

A No.

Q Do you know any pimps in Canada?

A No.

Q What day did you arrive in Montreal to visit your sister? What day of the week?

A It was about middle of May.

Q No. What day of the week, Monday, Tuesday, Wednesday, Thursday?

A I think it was a Friday.

Q What day did you leave Montreal?

A I think it was Monday or Tuesday. I think it was Tuesday.

Q What day did you meet Mitchell?

A I think it was the same day that I went to

Montreal, that night.

Q You met him Friday night?

A I'm pretty sure, yes.

Q You stayed in Montreal Friday night, Saturday night, Sunday night and Monday night?

A Yes.

Q And you left Tuesday, is that correct?

A Yes, I'm pretty sure.

Q How much of the $200 did you have left?

A Well, about 100.

Q About 100?

A Yes.

Q You spent 100?

A Pardon?

Q You spent 100?

A About that, yes.

Q Did you engage in acts of prostitution while you were in Montreal?

A No, I didn't.

Q You didn't need any money, is that right?

A Right.

Q When you left Montreal, where did you go?

A I came down to New York.

Q Where did you go specifically?

A Pardon?

Q Where specifically did you go?

A In Manhattan.

Q Where?

A You mean where did I stay when I first came here?

Q Absolutely. Where?

A On 14th and 4th.

Q I'm sorry.

A 14th and 4th.

Q 14th Avenue?

A And 4th Street, yes.

Q 14th Street and 4th Avenue, which street?

A No. Wait a minute.

4th Street -- 14th Street and 4th Avenue.

Q 14th Street and 4th Avenue?

A Yes.

Q Is that an apartment house?

A Yes, it is.

Q In which apartment did you stay?

A I think it was on the 17th floor.

Q Is that the first time you visited New York?

A Yes.

Q Had you run across many Americans when you

were up in Canada?

A No.

Q Did you ever run across any American?

A Very few.

Q Did you have any friends who are Americans before you came to the States?

A Yes.

Q Did they live in New York?

A Some of them did, yes.

Q Who?

A Well -- one or two of my girl friends who had come down.

Q What are their names?

A One, her name is Brandy.

Q Brandy?

A Yes.

Q What is her real name?

A Brandy. Brenda.

Q Brenda?

A Yes.

Q What is her last name?

A I don't know.

Q When did you know her in Canada?

A I met her -- I met her in Canada.

Q Where?

A In Toronto.

Q In Toronto when you were unemployed?

A No. when I was -- when I went out I met her at like -- when you go out to discotheques you meet --

Q She is a prostitute, isn't she?

A What?

Q She is a prostitute, isn't she?

A No.

Q She is not?

A No.

Q Was she ever a prostitute?

A No.

Q With whom did you stay when you came to New York?

A With James Mitchell.

Q His apartment?

A Yes.

Q How did you get to New York?

A By plane.

Q Train from Montreal?

A Plane.

Q Plane? I'm sorry.

A Yes.

Q You arrived at which airport?

A I can't remember. I think Kennedy. I'm not sure.

Q How did you get from the airport to New York City?

A Limousine.

Q Limousine?

A Yes.

Q What kind of limousine?

A One of those big black ones.

Q What kind of limousine?

A One of those chauffeur driven.

Q Didn't you take a taxicab?

A No.

Q Wasn't it very expensive for you to pay for a limousine?

A Well, I didn't pay for it.

Q Who paid for it?

A Mr. Mitchell.

Q Was it his car?

A No, he had just rented it.

Q Describe the limousine, please.

A It was a black one. I don't know. Just an ordinary limousine.

Q Just an ordinary one?

A Pardon?

Q Just an ordinary limousine like the kind you see at weddings and funerals?

A Yes.

Q Or did it have a big grill, big wide wheel, big white tires or it?

A No, just a limousine.

Q A very conservative limousine?

A Yes.

Q Chauffeur driven?

A Yes.

Q When you arrived in New York, was the limousine waiting for you?

A Yes, because he had called up from the airport like you could call for limousine to drive you from the airport home. And this is what he did.

Q Who had called?

A Mr. Mitchell had.

Q He met you at the airport?

A No.

Q How was the limousine --

A He was down -- he came back earlier and I --

Q -- He came back earlier, but when you arrived at

the airport was the limousine waiting for you?

A Yes.

Q Mr. Mitchell ordered the limousine?

A Yes.

Q So Mr. Mitchell knew when you were arriving?

A Yes.

Q Did you tell him when you were arriving?

A Yes.

Q How did you tell him? Did you call him up in America or did you tell him before you left?

A No, that we came together -- like he -- like when we left Canada, he bought his fare and I bought mine.

Q You traveled down from Canada together?

A Yes. Well, not together on the same flight.

Q I'm sorry.

A Not together because it wouldn't look good.

Q He sat on one part of the plane and you sat on another part of the plane?

A Yes.

Q You paid for your fare?

A Yes.

Q How much was it?

A It was -- I buy a round trip ticket. It was about $80.

Q $80?

A Yes.

Q That left you with about $20?

A Yes.

Q Did you know where Brandy lived when you first arrived in New York?

A No, because I met her in one of the clubs I went into. And I saw her there. And I knew her from Canada. But she was just visiting down here, that's all.

Q When you first came to New York, did you know anyone in New York other than Mr. Mitchell?

A No.

Q So you came to New York from Canada on an airplane with James Mitchell, but not together, with $20 in your pocket not knowing anybody, anyone in New York but Mr. Mitchell.

A I knew Mr. Mitchell.

Q Not knowing anyone but Mr. Mitchell.

A But I had a round trip ticket and I was going to go back.

Q Did you ever go back?

A Yes, about a year later. About six months, I guess.

Q Did you still have the $20?

A Pardon?

Q You still have the $20?

A Not that same $20.

Q You still have the round trip ticket?

A No, because --

Q Did you use it to go back?

A No, because I can't find it.

Q In any event, you stayed with Mr. Mitchell when you arrived in New York, is that right?

A I stayed in his apartment, yes.

Q In his apartment?

A Yes.

Q Did he stay there?

A Yes.

Q Off and on or regularly?

A Regularly.

Q Every night?

A Yes.

Q What do you mean yes, like that? Every night?

A I don't know. Maybe he -- to the best of my knowledge, yes. Sometimes I fell asleep and I'd wake up and he'd be gone, but I don't know what time he leaves. Maybe he left in the morning.

Q Was he there when you went to sleep, though?

A Pardon?

Q You still have the $20?

A Not that same $20.

Q You still have the round trip ticket?

A No, because --

Q Did you use it to go back?

A No, because I can't find it.

Q In any event, you stayed with Mr. Mitchell when you arrived in New York, is that right?

A I stayed in his apartment, yes.

Q In his apartment?

A Yes.

Q Did he stay there?

A Yes.

Q Off and on or regularly?

A Regularly.

Q Every night?

A Yes.

Q What do you mean yes, like that? Every night?

A I don't know. Maybe he -- to the best of my knowledge, yes. Sometimes I fell asleep and I'd wake up and he'd be gone, but I don't know what time he leaves. Maybe he left in the morning.

Q Was he there when you went to sleep, though?

A Yes.

Q You two lived together as man and wife?

A What do you mean by that? Was I using his name?

Q No, what I mean is this:

Every night Mr. Mitchell would be there and you would be there and in the morning he might be gone out to work and you stayed in the house?

A Yes, but that doesn't mean we're living as man and wife.

Q He didn't spend any evenings any place else, did he?

A I don't know.

Q What do you mean you don't know?

A We weren't married so I have no right asking him what he did.

Q Are you telling this Grand Jury that Mr. Mitchell stayed in that apartment every night for a year --

A Well, I don't know. I didn't stay there for a year. Just stayed there about two or three months.

Q For the two or three months that you stayed in that apartment, did Mr. Mitchell stay there every night?

A Almost.

Q How much is almost?

A Well, maybe -- almost, I mean, like -- maybe

he wouldn't be there one night out of the week or something.

Q One night out of the week?

A Well, I can't remember.

Q Let's go back to the weekend in Canada when you first met Mr. Mitchell. That was the first night you were in Montreal, correct?

A Yes.

Q Where did you stay that night?

A At my sister's apartment.

Q Where did you stay the next night?

A I spent the night with him.

Q That was Saturday night, is that right?

A Yes.

Q Where did you spend Sunday night?

A At my sister's.

Q Where did you spend Monday night?

A I can't remember. I think at my sister's. I can't remember.

Q Did you see Mr. Mitchell on Monday of that weekend?

A Yes, I think so.

Q Did you see him on Sunday?

A I think so, yes.

Q Of course, you saw him on Saturday because

you spent the night with him.

A Yes. But I can't remember. It was like two years ago.

Q When did Mr. Mitchell suggest that you come to New York?

A One of those days I was in Montreal.

Q Did you tell him at any time in Montreal that you had been a prostitute?

A Well, he asked me. I told him I did it a little bit.

Q When did he ask you?

A One of the days I was in Montreal.

Q What exactly did he say, if you can remember?

A I can't remember.

Q He asked you, though? You didn't volunteer the information?

A I can't remember.

Q You do remember --

A But I'm pretty sure it was brought up.

Q Who brought it up?

A I can't remember.

Q You just told us before that he asked you.

A Yes, well, he probably did. This is over two years ago.

Q But you do remember it being brought up during the weekend?

A It probably was, yes. I mean, I asked him a little bit about himself. He asked me a little bit about myself. It was probably brought up.

Q After it was brought up, Mr. Mitchell suggested that you accompany him to New York?

A To visit him for a few days, yes.

Q To visit him for a period of time?

A For a few days.

Q Did Mr. Mitchell ever suggest that you engage in acts of prostitution in New York?

A No.

Q Miss Sauer, perhaps I did not make my question clear, so I will put it in two parts.

While in Canada, did Mr. Mitchell ever suggest that you engage in acts of prostitution in New York or any other place?

A Not to the best of my knowledge, no.

Q While in the United States, did Mr. Mitchell ever suggest that you engage in acts of prostitution in New York City or any other place?

A In New York City, yes.

Q How soon after you got to New York did he

A No, just visiting here. It was in summer.

Q You were here for two months and you had $20. That's $10 a month, is that right?

A Yes.

Q Did your parents send you any money?

A No.

Q Did your sister send you any money?

A No.

Q Any people in Canada send you any money?

A No.

Q Did you borrow money in New York?

A Yes, from James Mitchell.

Q I'm sorry.

A From James Mitchell.

Q How much money did you borrow from James Mitchell?

A Whenever I needed it.

Q He, out of the goodness of his heart, gave it to you, right?

A Yes.

Q For how long have you been borrowing money from James Mitchell?

A Just when I was living -- when I was staying with him.

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Q Did there come a time when you no longer borrowed money from James Mitchell?

A Yes.

Q Did there come a time when he asked for money back?

A Sort of.

Q What do you mean sort of?

A Yes, he said -- he told me --

Q He told you he wanted his money back and he told you better go out in the streets and make some money for him, didn't he?

A Not like that.

Q Not like that, but that's what he meant?

A Yes.

Q Did you go out in the streets and make some money for him?

A Yes, I did.

Q How much?

A Altogether?

Q Altogether.

A Well, I was working for about three months altogether and I guess I made about -- let me think. I guess about -- in the three months, close to about ten grand.

Q When was that?

A Pardon?

Q When?

A Last summer.

Q Last summer, the summer of '72?

A Yes.

Q What did you do with the $10,000?

A I gave it to him.

Q What did he give you?

A Well, whenever I needed any of the money, he would give it to me.

Q He gave you back the $10,000?

A Not all of it.

Q How much money had he loaned you over that two months period?

A I guess about a thousand.

Q About a thousand?

A Yes.

Q How did you get the $10,000 that you gave James Mitchell?

A I saw men.

Q I'm sorry.

A I saw men.

Q There is not much of a market for looking.

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A Pardon?

Q How precisely did you get the money? Tell the Grand Jury.

A They gave it to me.

Q Out of the goodness of their hearts?

A Yes.

Q For no reason whatsoever?

A No.

Q You didn't do anything for the money?

A What am I supposed to do for it? I just asked them for it. They gave it to me.

Q Didn't you have sex with them before they gave you money?

A Some of them, yes, but not all of them.

Q What would you do for the others?

A Just asked them for it. They give it to me.

Q You just go up to them on the street and ask them for money?

A Not on the street.

Q Where?

A I got to know some people here, some men.

Q Of the $10,000, Miss Sauer, how much of it came from acts of prostitution?

A Most of it.

Q Most of it?

A Yes.

Q By acts of prostitution, I mean incidents when you had sex with men and they paid you. How much of the money came as a result of your being paid for having sex with men?

A Most of it.

Q Where would you have sex with these men?

A In their hotel or a hotel on the street.

Q After you left James Mitchell's apartment, where did you live?

A I left him. I went to -- I went sort of in hiding.

Q You went sort of in hiding?

A Yes, I stayed with a friend of mine.

Q You lived with James Mitchell for about two months, is that right, after you came to New York?

A Yes, about two or three months.

Q After those two or three months, you left James Mitchell?

A Yes.

Q The period of time that you gave Mitchell about $10,000, was that the period of time you were living with him?

A Yes.

Q After you left him, you didn't give him any more money?

A No.

Q What does the word "pimp" mean to you?

A Someone who makes it -- who tells a girl go on the street and then takes money.

Q What do you mean by going out on the street?

A Pardon?

Q What do you mean by going out on the street?

A Having been a prostitute for him.

Q And then take some money?

A She gives it to him or he takes it, whatever.

Q Was James Mitchell your pimp?

A Well, I was working on the street and --

Q You were working on the street, you gave him your money, and you got the money for having sex with men. Was James Mitchell your pimp?

A Yes.

Q Is this the James Mitchell we have been talking about?

A Yes. But I knew him better as Porky.

MR. PADGETT: Mr. Foreman, may the record reflect that the witness has

identified the photo of James Mitchell, also known as Silky, which was previously received by this Grand Jury's No. 9 during one of the May sessions.

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Q Miss Sauer, I show you this book. Do you recognize the photo on the cover?

A It looks like James Mitchell.

Q It looks like James Mitchell?

A Yes.

Q Is it James Mitchell?

A It looks like him.

Q If you saw that man on the book walking down the street, who would you say it was?

A If I saw that man walking down the street, I wouldn't even notice him.

Q You wouldn't notice him?

A No.

Oh, if I saw him, who would I say? The man -- the guy who is on that book, if I recognized him, if he was dressed like this.

Q If you saw this man walking down the street --

A Dressed like that.

Q -- would you walk by him or would you say, "Hi, Porky?"

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A Just like that?

Q Just like that.

A Well, I don't know if that is Porky.

Q I don't know either. I am asking you.

A Is that Porky?

Q I have never met the man. Is that Porky or not?

A It looks like him.

Q You have seen this book before, haven't you?

A Yes.

Q Have you read it?

A No.

Q Have you looked at the pictures?

A Yes.

MR. PADGETT: Mr. Foreman, at this time may the Grand Jury receive as evidence an exhibit, this book entitled "Gentleman of Leisure," a year in the life of a pimp, text by Susan Hall, photographs by Bob Adelman, which consists of 189 numbered pages and some additional photographs and glossary at the end, together with a slipcover which has it on a picture of a man who the witness says looks like Porky.

(Book entitled "Gentleman of Leisure," marked Grand Jury's Exhibit 1 as of this date.)

Q Miss Sauer, your picture appears in here, doesn't it?

A Yes, it does.

Q Pardon?

A Yes.

Q I show you this particular picture which appears across from Page 147 of Exhibit No. 1. Do you recognize any of the people there?

A Yes, that's me and my sister.

Q Which one is you?

A This one.

Q Indicating the girl to the right with the white blouse on?

A Yes.

Q I show you the picture on Page 49. Do you recognize that person?

A That's me.

Q I show you the picture on page 150. Do you recognize that?

A That's me.

Q I show you the picture on Page 100 -- across from Page 145. Do you recognize that person?

A Yes, that's me.

Q Across from your picture does the word Tracey

appear?

A Yes.

Q Are you known as Tracey?

A No.

Q You said you didn't read the book. Did you read the part about Tracey in here?

A No.

Q You didn't read it at all?

A No. I think it's disgusting.

Q Why?

A Why would I read a book like that for? I am not interested in his life.

Q You are telling us that although your photo appears three times and a photo of your sister appears once, you have not read the book?

A No.

Q You glanced through?

A Yes.

Q Did you glance through the part that your photo appears in?

A Yes, that's all I did. I don't want to be reading that.

Q Did you read some of the words?

A No.

A read any of the words at
No, because I really don't care what
that book.

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Q Why not?

A Because.

Q Tell us.

A Because I'm not interested in the way he

Q Why not?

A I just -- it wouldn't interest me. What's
there -- just my picture.

Q Would you like to read it?

A No.

Q You seem rather upset at the fact that your
picture has appeared in this book across from the name
Tracey. I ask you again, did you read any of the book
or did people describe the book to you?

A Yes, they told me about it.

Q Are you rather upset about the book?

A Yes.

Q Why?

A Because I don't like my picture in a book
like that.

Q Tell the Grand Jury why.

A I just don't want my picture in a book like

that.

Q The book describes you as a prostitute?

A Yes, well.

Q When were the pictures taken?

A They were taken about two years ago by Susan and Bob. But I didn't know they are going to print a book like that.

Q Were they taken during the summer when you were living with Mitchell?

A Yes.

Q You were a prostitute then?

A Yes.

Q Mitchell was your pimp then?

A Yes.

Q The book says that you were a prostitute and that Mitchell was your pimp?

A Well, if that's what it says in there.

Q If it says that, it's true?

A I don't know. I mean is it a non-fiction book or fiction? I mean do you believe what's in books? I don't.

Q I think that's one of the reasons that the Grand Jury is calling witnesses here to find whether the book was fiction or non-fiction.

A Oh, I see. Oh.

Q I think the Grand Jury would appreciate your telling them anything you know about that section of the book.

A I am.

Q In your own words. Just tell us.

A About what?

Q Tell us about your life with James Mitchell.

A Well --

Q Tell us why you went with Mitchell, what you did with him and why you left him, that's all.

A Because I wanted to visit New York and he said, "Well, come down and visit me for a few days," and then he wouldn't let me leave.

Q I'm sorry. I didn't hear the last thing you said.

A He wouldn't let me leave. I -- twice I left and he found me and he brought me back. And so finally I just found a place to stay. And I left and I found him and I told him that I had left him.

Q What did he say then?

A He tried to get me to come back.

Q How did he try?

A Well, you know those kind Johns, they lay on

you, you know.

Q Tell us.

A You're my baby, you know, I need you, why don't you come back, I love you.

Q When he punched you in the nose, what were the circumstances surrounding that?

A Oh, that was before.

Because this other girl or him, he had my ID. I wanted to leave. I wanted to go back to Canada, and I couldn't find my ticket or my ID. I asked him where was it. And she went back and told him.

Q Did you want to continue as a prostitute working for Mitchell?

A No.

Q Miss Sauer, this book has made you pretty famous, hasn't it?

A Not famous.

Q In certain circles?

A No, it hasn't helped me none.

Q I am not saying it's helped you. I'm saying, you know, that this book is out in paperback now, you know?

A Yes.

Q You know that your picture is all over New York City and all over the United States?

A I know that.

Q You are not particularly happy about that, are you?

A No.

Q You have known for sometime that this Grand Jury was investigating activities of pimps, haven't you?

A No, I just found it out when I was served my first subpoena.

Q At any time has anyone discussed -- other than your lawyer or your sister -- your testimony, either the testimony that you have given or the testimony that you were going to give in this Grand Jury?

A Discussed? No.

Q Did you ever talk to anyone other than your lawyer or your sister --

A Well, a few of my friends know about it, that I have to come here.

Q Did James Mitchell either directly or indirectly, that is to say, through somebody else --

A Does he know that I'm here?

Q Yes.

A I don't think so because I was in this club after I was served my first subpoena, and he came in and like he didn't come over to me. So apparently he doesn't --

if he does, I don't know if he does. I don't know.

Q Has anyone threatened you?

A Pardon?

Q Has anyone threatened you?

A No.

Q Are you telling us the truth?

A Not yet.

Q Has anyone advised you not to testify other than your lawyer or your sister?

A Yes, a few people who heard about it and think it's best if I leave the country or something, not come.

Q They thought it as best if you didn't come?

A Yes.

Q Were these people who thought it was best you didn't come prostitutes?

A One or two, yes.

Q Who are they?

A A girl named Barbara.

Q Barbara what?

A I don't know her last name.

Q Has she been subpoenaed?

A I don't know. I don't talk to her anymore.

Q Who is the other one?

A This other girl that I met, but I don't know

who she is.

Q During the period of time that you were a prostitute working for Mitchell, what other girls worked for him?

A Pardon?

Q What other girls worked for him?

A The girls in the book.

Q What are their names?

A One was Kim.

Q Their full names.

A I don't know their full names. I just know first names.

One was Kim and one was Janet, one was Vickie, then he had a black girl there for awhile named Melinda and a girl named Gaynor.

Q Did they live in the same apartment?

A No.

Q Did they live in different apartments?

A I don't know where they lived. I guess so.

Q Did you ever meet any of them?

A Yes.

Q Did you ever discuss James Mitchell with them?

A Yes.

Q Did you ever tell them how much money you

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were making on the street?

A Sometimes I would.

Q Was there a competition to bring in the most money for Mitchell?

A No, because I always made the most money.

Q How much would you make on an average night?

A Two hundred.

Q Does the girl who makes the most money enjoy special status?

A I don't know. I didn't -- I didn't like Porky. I mean, I just did my thing and I wanted to be left alone.

Q Why did you do it?

A I had no choice.

Q What do you mean?

A Well, like I wanted to go back to Canada and he had my ID and I think he had taken my ticket. So I was just doing it to make peace with him and to find out like -- to find a place to go to until I was able to leave him.

Q If the ticket cost $80 --

A Yes.

Q -- and you made $200 a night, why didn't you just go back to Canada?

A All my clothes were there. All my clothes were there and everything.

Q When you discussed with the other girls Porky or Mitchell, did they ever tell you how much they made?

A Sometimes, yes.

Q How much did they tell you?

A I guess about the same, if they worked. I guess about the same.

Q This was during the summer of 1972?

A Yes. It was 1971.

Q 1971?

A Yes.

Q How many girls were working for Mitchell in the summer of 1971?

A I don't know if they were working for him or --

Q How many -- go ahead. Continue.

A He had a lot of girl friends, I guess.

Q How many girls told you in the summer of 1971 that they gave James Mitchell money?

A None of them.

Q None of them? You told them that you gave him money?

A No, I didn't.

Q What did you tell them?

A Pardon?

Q What did you tell them?

A Well, I never really saw them that much.

Q You just said to us that you discussed with them how much money --

A We talked a little bit, girl talk. I mean, we weren't allowed to discuss things like that, or if he found out about it, he didn't like it. He got very annoyed.

Q Did the other prostitutes ever tell you how much money they were making?

A Well, he had girls. I don't know if they were -- I don't know about prostitution.

Q Did any of the other girls tell you how much money they were making?

A Sometimes they did, sometimes they say, "Well, I made $100" -- I don't know if they gave it to him. I don't know.

Q The girls in the book you described as prostitutes worked for Mitchell, is that right?

A Yes.

Q Did any of those girls ever tell you how much money they were making on the street?

A Yes. But I don't know if they gave it to Porky.

Q How much money did they tell you that they made on the street?

A Sometimes we would be talking, they'd say,

"Well, I made only 100 because I got picked up last night," or something like that. I mean it was -- you know, girl talk.

Q How many nights a week did you have to work?

A Five.

Q What happened if you didn't bring the money in?

A Well, sometimes I got picked up by the police.

Q Suppose, for example, on a Monday night you were supposed to go out and work and you didn't. You said I don't want to.

A Well, I got -- I didn't.

Q Why not?

A Pardon?

Q Why not?

A Why?

Q Why didn't you refuse to go out and work?

A Say it to him?

Q Yes.

A Because he would beat me.

Q He would beat you?

A Yes, I guess so. It never happened that I said that to him.

Q Did he ever beat any of the other girls?

A I don't know.

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Q Did he ever say he did?

A No.

Q Did he ever say that he ever beat one of the other girls who refused to work?

A No.

Q Did he ever say --

A All the girls did work for him.

Q Did he ever threaten you directly or indirectly?

A Not threaten.

Q What did he say?

A But I told him I wanted to leave and he says, "No, you can't leave. You can't leave me." I got scared. I didn't know what this man was going to do.

Q Why were you afraid of him?

A Because like he told me he was going to beat me.

Q You told us before that he loaned you money during those three months.

A Yes, when I first came here.

Q When did you first begin to give him money?

A About a week after, two weeks after.

Q You told us that he loaned you a thousand dollars.

A I guess around there. In the period of time? In the period of time?

Q Yes.

A Well, I guess he gave me more because I -- he had money and I needed money and all the money I gave him was mine anyway.

Q Before you became a prostitute for Mitchell, how much money had he loaned you?

A Not that much because I was staying with him, and -- like he was taking care of me, sort of. I was staying in his apartment, and eating his food. And after about a week, he told me that I couldn't do that anymore, that I had to go out and work for him.

Q Did he say in those words"You got to go out and work for me?"

A I can't -- yes. I can't remember exact two years ago. I don't know.

Q You didn't say anything in response to him, "Gee, I know there is a great job I can get as a cashier in a store?"

A No, because I cannot work down here because I was just visiting.

Q He told you to go out and work the streets, didn't he?

A Yes.

Q Miss Sauer, would you step outside a moment,

please?

A Yes.

(Witness excused.)

N A N C Y S A U E R, resumed the stand and testified further as follows:

EXAMINATION (cont'd) BY MR. PADGETT:

Q Miss Sauer, how many times were you arrested?

A Four, I think.

Q Did you pay any fines?

A Yes.

Q Did you ever go to jail?

A Yes.

Q For how long a period of time?

A I used to go just like overnight.

Q Overnight and you went to court the next morning --

A Well, it depended. You can get picked up on two things, disorder and a case.

Q Disorderly conduct, if you were picked up for disorderly conduct --

A You were thrown in jail.

Q You went to jail and you were released the next morning?

A Yes.

Q If you had a case, you had a direct solicitation with an undercover officer?

A Or they overheard you or something like that.

Q What happened on those occasions?

A Well, you go before the judge.

Q Did you ever go to jail as a result of that?

A Not jail, I got fined.

Q Who paid the fine?

A I did.

Q Where did you get the money?

A From Mr. Mitchell.

Q Were you represented by a lawyer?

A Yes.

Q Who paid the lawyer?

A Who did? I guess he did.

Q You never paid a lawyer?

A I think so. Either like he gave me money and I paid him or he paid him.

Q Mitchell gave you the money?

A Yes.

Q Then you gave it to the lawyer?

A Yes.

Q How would Mitchell know that you had gotten in jail?

A Yes, his other girl friends.

Q Did he ever threaten them?

A I don't know.

Q He was yelling and screaming at them, wasn't he?

A Yes, but he would like -- I'd be in the other room.

Q Which room was this all taking place in?

A In the bedroom. He would like take you into the bedroom and talk to you, but sometimes he raised his voice.

Q Which bedroom was this?

A The bedroom -- his bedroom on 14th and 4th.

Q The apartment you were living in?

A Yes.

Q How did all those other girls get there?

A Some of them came to visit him.

Q Did they stay there?

A No.

Q Miss Sauer, I am going to show you some photos and I will ask you if you recognize any of these gentlemen.

A One or two of them look familiar.

Q Which ones?

A This one. Yes, only this one.

Q Just this one?

A Yes.

Q Do you know the name of this individual?

A No, it's just I've seen him a few times. I think his name is Calvin. I don't know.

MR. PADGETT: Mr. Foreman, may the record reflect the witness has identified the picture of William Gaither, also known as Calvin Ferguson, previously received by this Grand Jury as Exhibit No. 4 during the May session.

Q When did you see this man?

A I saw him a few months ago coming out of the apartment building I'm staying in.

Q You are telling us that you seen this man once?

A I saw him about two or three times.

Q Always coming out of the building?

A No. In different places. Once I saw him in this restaurant where I was sitting and then once I met him at this club where I was introduced to him.

Q Who introduced you to him?

A I can't remember, but I remember being introduced to him.

Q Did you engage in a conversation?

A No.

Q Did anybody ever tell you that he was a pimp?

A No.

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Q Did he ever tell you he was a pimp?

A No.

Q Did he ever ask you to work for him?

A No, we never really talked.

Q Did he ever ask you to be with him?

A No, we never really talked.

Q Miss Sauer, I am going to ask that you be excused. However you are still subject to call of the Grand Jury. No new subpoena need be served upon you.

A How will I know when to come back?

Q You will be contacted by the Grand Jury. Do you still reside at the same address at which you were served?

A Yes, I do.

Q Do you intend to reside there in the foreseeable future?

A Yes, but you see, I -- I go to Canada because I visit here. What if I'm in Canada? Usually I tell my attorney when I'm going, when I'm out.

Q Will you inform the Grand Jury through your attorney before you leave the United States?

A Yes, I always do.

Q Will you tell your lawyer to tell me of your intention to leave? 627

A Yes, I will.

Q I am not talking about five minutes before you step on the plane either.

A You know when I went. I told you last time.

Q Will you tell the Grand Jury, will you see that the Grand Jury is informed sufficiently prior to your leaving the country?

A Yes.

Q Will you hold yourself in readiness to testify again?

A Pardon?

Q Will you hold yourself available to testify again?

A Yes.

MR. PADGETT: Mr. Foreman, would you excuse this witness subject to recall, please.

THE FOREMAN: You are excused subject to recall.

THE WITNESS: Thank you very much. Good day.

(Witness excused.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

628

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

JAMES MITCHELL,

Defendant.

74 Cr. 265

AFFIDAVIT

----------x

STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

JAMES MITCHELL, being duly sworn deposes and says:

I am the defendant in the within action, am fully familiar with the facts and circumstances of this matter and I submit this affidavit IN SUPPORT of the instant application seeking a new trial pursuant to Rule 33 Federal Rules of Criminal Procedure upon the grounds of newly discovered evidence.

STATEMENT OF FACTS

On or about March 7th, 1974, I was indicted with the charge of willful evasion of Federal Income Tax for the calendar year 1971, in violation of Title 26, United States Code, Section 7203. After a trial, without a jury, before the HON. RICHARD OWEN of the United States District, Southern District of New York, a guilty verdict was rendered. Sentencing is scheduled to take place on August 23, 1974.

On July 19, 1974, for reasons more specifically set forth hereinafter, the firm of BANDLER and KASS, ESQS. who represented me at the trial were substituted with the law firm of STEIN and LaGRECO, P.C.

RICHARD C. STEIN, ESQ., one of my attorneys, has informed me that a key element in a tax evasion charge is the willful non-payment of taxes. Holland v. United States 348 U.S. 121 (1954). The newly discovered facts, which are set forth in this affidavit, as well as SUSAN HALL's, which is annexed hereto, will conclusively and unequivocally demonstrate that my intent at all times was to pay any taxes which were due and owing to the United States Government and more specifically there was no willful non-payment. As proof of this intent, I retained counsel, immediately upon learning, that a tax problem might exist prior to the indictment in this case. I instructed my counsel, WILLIAM WERNER, ESQ. to ascertain whether if in fact, a tax problem did exist, and if so I authorized him to resolve it. My intentions at all times, as my actions have demonstrated, is to cooperate and comply, in all respects with this tax proceeding.

On or about December, 1971, I was involved in a series of meetings with an author named SUSAN HALL. In return for my cooperation and assistance with a book she was to write, I would receive 10% of any royalties that she or ROBERT ADELMAN, the photographer of the book would receive. This book when subsequently completed was titled, The Gentleman of Leisure.

To handle the business and tax consideration that might arise, I arranged for my attorneys, BENJAMIN GOLUB, ESQ. and DAVID PRAVDA, ESQ. to meet with Hall and myself on July 17, 1972. At this meeting it was agreed that a corporation would be formed, as a vehicle, in which any royalties received from the book, would be reported and accounted for. The name subsequently given to this venture was PORCUPINE PRODUCTIONS, INC. In order to warrant and guarantee that Porcupine would be managed correctly, I authorized

Golub and Pravdo Esqs. to retain 5% of Porcupine as their consideration, for managing and running the same. Chief among their duties, was to account for and pay taxes, and this too was prior to any indictment or investigation. 630

In early May of 1973, I was involved in negotiations with Susan Hall, Robert Adelman and Robert Jacobs, a producer, who had acquired the movie rights to Gentleman of Leisure. Mr. Jacobs had arranged for a movie to be produced by DINO de LAURENTIIS. At the productions's outset, I was planning solely to write the music for the film, but due to DINO de LAURENTIIS' insistence, I agreed to star in it as well.

On or about May 8, 1973, at a meeting attended by Hall, Jacobs and myself, I was informed by Hall, that I was the subject of an Internal Revenue investigation. When Hall further advised me that agent Rothenberger requested that Hall produce me, I decided to obtain counsel. Mr. Jacobs, who was present, informed me that WILLIAM WERNER, ESQ., an associate of Bandler and Kass, Esqs., the firm which was representing him was an expert in tax matters. Pursuant to this information and recommendation I arranged for a meeting with Mr. Werner to discuss this matter. At this meeting which occurred on or about May 9, 1972 in his office, Werner, assured me that he was knowledgeable in this area, and that he was capable of negotiating a settlement with the Internal Revenue Service if necessary. Mr. Werner informed me that the retainer fee to have him appear in my behalf was $5,000.00. Before I departed, I told Werner that I wanted him to represent me but I could not afford his fee. After the meeting I proceeded to the office of Robert Jacobs and advised him of what Werner said both to the disposition of the problem and his fee to handle it. Jacobs telephoned Werner and at Jacobs' request Werner agreed to reduce his fee to $3,000.00. This fee was paid on May 10, 1973 by Susan Hall in my behalf. After the retainer was paid, I saw Mr. Werner again at his

office. Also present was an associate, STEVEN SCHNEER, ESQ., who I am informed is no longer with the firm. These two parties questioned me as to my finances and other pertinent information they said would be required to resolve any tax problems that might arise. Mr. Werner went on to further state that he believed I might have to pay the Internal Revenue Service approximately $5,000.00 to settle a tax problem, if one indeed existed.

During the following months I telephoned Mr. Werner at least once a month, often more, in regards to the disposition of the tax matter. Mr. Werner assured me that all was well and that it was not necessary to call every month. In compliance with his instructions, I limited myself to telephoning once every four or five months. The response was always the same: "There is nothing to worry about, negotiations areealmost complete." These calls continued until I was indicted and arrested.

After I was indicted, the law firm of Bandler and Kass, Esqs. continued to represent me. At the arraignment, HOWARD DRUCKMAN, ESQ. of Bandler and Kass, Esqs. appeared in my behalf, since William Werner, Esq. was out of the country at the time Arguing in support of my application for bail Druckman, advised the court that there was no attempt whatsoever to defraud the government. As proof of this Druckman stated to the court that his firm, Bandler and Kass, Esqs. had previously been retained by me to resolve this tax matter, and that as far as he knew an associate was currently handling it. Mr. Druckman went on to further state to the presiding magistrate that he was under the impression that the entire criminal proceeding was due to a mistake. At the trial William Werner, Esq. and William Sherr, Esq. appeared in my behalf.

At the outset of the trial, my attorneys suggested that I plead guilty. I refused, asserting my innocence and my prior good faith in resolving this matter.

During the course of the trial, my attorneys made no attempt whatsoever to prove my good faith. Or offer into evidence

either through the cross-examination of Susan Hall, through the direct testimony of William Werner, Esq., or the direct testimony of ROBERT ADELMAN, my previous efforts and actions which would have proved that I did not have the requisite willful intent necessary to be guilty of the crimes with which I was charged.

My constant inquiries both to Werner and Schneer, as to the reason for not disclosing this information, were met with the response that this was a "tactical maneuver". At this posture, in view of the additional facts which I have just learned through due diligence, which were not attainable to me at the time of the trial, I am constrained to state that this non disclosure by Werner and Schneer was not a "tactical maneuver", but rather was a deliberate and secretive attempt to shield and cover up William Werner's prior negligent, irresponsible and careless manner of handling my affairs before the Internal Revenue Service. The exigencies of the circumstances, as well as equity, dictate that this disclosure be made now. I am certain that this effort on my part to comply with the requirements of the taxing authority should have been called to the attention of the court during my trial, and that this evidence would have gone a long way towards exonerating me.

In conclusion, I repeat and reiterate that, at no time did I ever willfully intend to defraud the government of the United States or the Internal Revenue Service, in any manner whatsoever. If afforded the opportunity to testify at a hearing, I will state under oath and penalties of perjury the allegations of fact set forth herein.

WHEREFORE, it is respectfully requested that a hearing be granted to determine why a new trial should not be granted herein pursuant to Federal Rules of Criminal Procedure Rule 33 upon the grounds of newly discovered evidence.

JAMES MITCHELL

Sworn to before me this
16th day of August, 1974

JOHN D. LeGRECO
Notary Public, State of New York
No. 24-0230415
Qualified in Kings County
Commission Expires March 30, 19 75

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

634

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

74 Cr. 265

AFFIDAVIT

JAMES MITCHELL,

Defendant.

----------x

STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

SUSAN HALL, being duly sworn deposes and says:

I am the author of the book Gentleman of Leisure.

At the outset, I am constrained to state, that the additional facts that are set forth in this affidavit, which I did not testify to at the time of the trial, are with the express authorization of James Mitchell. At the trial of Mr. Mitchell, I was under a first amendment duty to protect the confidential relationship existing between us, to wit, journalist and source. After a lengthy interview with both Mr. Mitchell and one of his attorneys, RICHARD C. STEIN, it was agreed that both in the interests of justice, and Mr. Mitchell's best interests, that I now reveal the complete facts surrounding this matter.

On or about December, 1971 I was introduced to James Mitchell by an acquaintance of mine, who suggested that I meet Mitchell, who might be a good subject for a book. This meeting subsequently evolved into the book The Gentleman of Leisure. As consideration, for his cooperation, Mitchell was to receive 10% of the royalties received by ROBERT ADELMAN, the photographer of the book and myself.

Aware of Mitchell's inexperience and naivety in relation to business matters and their possible tax ramifications I had him arrange for a meeting with me and his attorneys.

This meeting occurred on July 17, 1972. Mitchell who attended, was represented by DAVID PRAVDA, ESQ. and BENJAMIN GOLUB, ESQ., I appeared on my own behalf. After a lengthy discussion, and a review of the circumstances, it was agreed that the most sensible way to handle the distribution of money from The Gentleman of Leisure, to Mitchell would be the establishment of a corporation as a vehicle in which Mitchell would declare his income. The name given to this corporation was PORCUPINE PRODUCTIONS. To insure and guarantee that this matter would be handled properly, it was further agreed that Golub and Pravda would retain 5% of Porcupine Productions as their consideration for managing the corporation.

Upon the formation of the corporation, I was secure in the fact, that there would be no tax difficulties, either to myself or Mitchell by my advancing income to Porcupine Productions.

After the book was completed and a publishing contract executed, advertising appeared, on or about April 22, 1973.

On May 2, 1973, Special Agent Rothenberger of the Internal Revenue Service, contacted me and arranged for a meeting. This meeting was held at 120 Church Street, attended by myself and two agents. In response to inquiries, I advised the agents of two payments I had made to Mitchell, the subject of their investigation, through Porcupine Productions. The first payment was $2,000.00 receipted by David Pravda, Esq., on behalf of Porcupine Productions on July 17, 1972. The second payment, was in the amount of $1,000.00 which I paid Porcupine Productions, personally, shortly thereafter. After a review of my notes, I informed the in-

ternal Revenue Service through Mr. Rothenberger that $1,000.00 of the $2,000.00 I had originally reported I paid to Porcupine, was actually delivered to Mitchell in July of 1971, the second payment of $1,000.00 in May of 1972. In addition, to the questions already set forth, Rothenberger asked me whether I could produce Mitchell.

During the early part of May, 1973, the same period in which I was advised of the Internal Revenue Service investigation of Mitchell, I was also seeing ROBERT JACOBS, a producer who was in the process of acquiring the movie rights to Gentleman of Leisure, daily in regards to the preparation of the Gentleman of Leisure film. At this time, the movie was to be produced by DINO di LAURENTIIS. Due to the nature of the book, and its current good sales, there was good reason to believe that a movie made would be profitable. It was agreed that in order to exploit the commercial success of the book to its fullest, Mitchell might star in the movie to be produced.

In view of my meeting with Rothenberger of the Internal Revenue Service on May 2, 1973, I advised Jacobs forthwith on May 3, 1973, of what I had learned the previous day. After a discussion of the problem, Jacobs and I agreed that the best and obvious solution would be to obtain counsel for Mitchell, to resolve any tax difficulties. On or about May 9, 1973, at a meeting with Mitchell, with Jacobs present, I advised Mitchell of my meeting with Rothenberger of the Internal Revenue Service, and his request that I produce Mitchell.

Upon hearing this, Mitchell decided to come forward. Pursuant to this and at Mitchell's direction, Mitchell with a check I issued on his behalf, retained the law firm of BANDLER and KASS, ESQS. and WILLIAM WERNER, ESQ., an associate of theirs, who was according to Jacobs, who recommended him, a tax

expert. The sole reason Werner was retained was to ascertain if Mitchell had a tax problem, and if one existed, Werner would resolve the same. The initial retainer fee of this firm was $3,000.00 which I paid on behalf of Mitchell. A true copy of the check I used to pay them is annexed hereto and made a part of this affidavit. Due to the costs involved in the production of the movie, and my relationship to Mitchell, as author of the book, I felt an obligation to insure his continual presence at the scenes of shooting.

By retaining the firm of Bandler and Kass, Esqs., I felt that I had fulfilled my obligation, both to Rothenberger of the Internal Revenue Service in producing Mitchell, and the persons making the film.

In order to facilitate Mr. Werner in handling this matter we had a meeting at his office on or about May 14, 1973, in which I advised him of my financial dealings with Mitchell. Werner assured me that he was experienced in this area, and that he would resolve any problems that might arise.

During June and July of 1973 I was frequently in the offices of Bandler and Kass, Esqs., since the firm represented Jacobs, in the film negotiations which were currently in progress. During this period of time, I spoke to William Werner, Esq. as to his results, if any, in the Mitchell tax matter. To the best of my recollection Werner advised me that he had seen Rothenberger and that everything was okay.

Assuming this matter was disposed of, I was quite surprised in February of this year, when the Internal Revenue Service arrived at my apartment requesting that I clarify and confirm the 1971 payment to Mitchell. I confirmed the payment at that time. During the course of the interview the efforts I made to advise

the Internal Revenue Agent of my payments to Bandler and Kass, Esqs., were met with the response that: "I'm not interested in that payment."

I was subsequently subpoenaed, and appeared as a government witness in the trial of Mitchell.

The payment and Mitchell's intentions to come forth were not discussed nor was I questioned as to the same.

Throughout the countless meetings and events which transpired during my course of dealings with Mitchell, I may most definitely state that it was the express wish and desire of Mitchell that his tax problems be resolved and that he be legitimate. This desire was implemented through the two aforementioned actions. First and foremost was the retention of the law firm of Bandler and Kass, Esqs. and William Werner, Esq. to arrange for the disposition of a tax problem, if any, In addition, in order to simplify the accounting from income derived from Gentleman of Leisure, a corporation was formed, not for the pruposes of hiding money as the government alleges, but rather to disclose and pay the same. As direct evidence of this, and in order to insure compliance, there was active participation by attorneys, who were to retain 5% of the fee as their consideration.

If I had been afforded an opportunity to testify to these matters at trial I would most certainly have done so and if in the event that a further opportunity is presented, I will, under oath, testify, to the matters, set forth in writing herein.

SUSAN HALL

Sworn to before me this
20th day of August, 1974

JOHN D. LoGRICCO
Notary Public, State of New York
No. 24-9820415
Qualified in Kings County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

JAMES MITCHELL,

Defendant.

74 Cr. 265

AFFIDAVIT

----------x

STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

RICHARD C. STEIN, being duly sworn deposes and says:

I am the attorney for the defendant, JAMES MITCHELL, am fully familiar with the facts and circumstances of this matter and I submit this affidavit IN SUPPORT of the instant application seeking a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure upon the grounds of newly discovered evidence.

The within defendant was indicted and charged with the crimes of willful evasion of Federal Income Tax in violation of 26 U.S.C. 720 and willful failure to file income tax returns for 1971 in violation 26 U.S.C. 7203. After a trial before the HON. RICHARD OWEN, of this court, without a jury - a guilty verdict was rendered. Thereafter the defendant James Mitchell substituted the firm that had been representing him, Bandler and Kass, Esqs., with the firm with which I am associated, STEIN and LaGRECO, P.C.

Since the completion of the said trial, your deponent has made a diligent and comprehensive investigation of any and all persons having knowledge or information relevant to the issues herein. That on or about August 5, 1974, I discovered, for the first time, certain facts hereinafter set forth which neither the

defendant, nor anyone else could have discovered in the exercise of due diligence before, or during trial, for the reason that there was no way of knowing of the existence of such facts until I had discovered them.

This newly discovered evidence, as more fully set forth in the annexed affidavits of James Mitchell and Susan Hall, reveals that the interests of the law firm representing the defendant at the trial were diametrically opposed to those of the defendant.

In an effort to keep an associate William Werner, Esq.'s prior negligence undisclosed, William Sherr, Esq. devised a trial strategy, that was designed not to advance or promote the interests of his client, but rather was conceived to protect the reputation of his firm. At the trial's conclusion, this strategy prevailed. William Werner's negligence remained undiscovered, however,as I will demonstrate the cost of this non-disclosure, to James Mitchell was a guilty verdict.

At this posture, in view of this newly discovered evidence, I am constrained to seek the equitable intercession of this court. It is respectfully prayed that an order be entered herein, granting unto the defendant a hearing pursuant to Rule 33 of the Federal Rules of Criminal Procedure to determine why a new trial should not be granted.

Counsel is well aware of the countless unfounded and meritless motions which are brought under Rule 33. Nevertheless this affidavit will conclusively demonstrate, that not only that this is the proper remedy but in addition that a new trial is warranted.

> "A motion for a new trial based on the ground of newly discovered evidence has to meet the following requirements: (1) It must appear from the motion that the evidence relied on is, in fact, newly discovered, i.e. discovered after the trial; (2) The motion must allege facts from which the court may infer diligence on the part of the movant; (3) The evidence relied on must not be merely cumulative or impeaching; (4) Must be material to the issues involved; and (5) Must be such as, on a new trial would probably produce an acquittal."

Pitts v. United States 263 F 2d 808 (9th Cir. 1959) cert den. 360 U.S. 919.

In order to facilitate this proceeding, and conclusively establish, that the facts of this matter fall clearly within the proscriptions of Rule 33 of F.R.C.P. as established by the Pitts v. United States case (supra) I shall hereinafter categorize my allegations of fact and law.

ANENT THE NEWLY DISCOVERED EVIDENCE

As the affidavits of Mitchell and Hall demonstrate, the evidence that is set forth was discovered after trial. In fact, due to the nature of the evidence itself, there was no means of determining what had actually happened until the trial had concluded. As this court is well aware, the term "newly discovered" evidence must be liberally construed.

ANENT DUE DILIGENCE ON THE PART OF THE MOVANT

Immediately following the trial, the defendant obtained new counsel. After an in depth interview, with me in my offices on July 19, 1974, and a review of the facts, I concluded that the allegations of the defendant merited further investigation.

Pursuant to this, I along with my associates, began an intensive inquiry into this matter. This was accomplished primarily through interviews with persons having relevant informa-

tion. At the investigation's end, there was just one conclusion that could be drawn. The course of conduct of the firm of Bandler and Kass, Esqs., in representing James Mitchell at his trial, was designed and carried out to cover up an associate's prior negligent handling of James Mitchell's affairs.

It was only through the due diligence of myself, my associates and the defendant, that these facts were discovered.

ANENT THE EVIDENCE

The said newly discovered evidence is neither cumulative or impeaching in nature, in that no evidence of the said facts were produced upon the trial by either the prosecution or the defense. This evidence is of such a nature and so material that there is good reason to believe that it would probably produce a different verdict if a new trial were granted. In support of this I respectfully refer this court to the case of Hayes v. United States and its companion case, McDonald v. United States, 277 F2d 540 (10th Cir. 1955). The defendants in these cases were convicted of willfully evading income taxes by filing a fraudulent return. In determination of the question of good faith the court held at 543:

> On the other hand, payment may be made or offered to be made under such circumstances as to warrant an inference of good faith and lack of evil intent. Such latter evidence is admissible in an income tax evasion case to support the contention that there was at no time any intent to evade payment of taxes. Whether such evidence is admissible depends upon the facts and circumstances of each case. (Emphasis Added)

The fact that Mitchell immediately retained counsel to handle the payment of taxes, if indeed any were due, upon learning of a problem is direct evidence of his good faith and non-

willful conduct in respect to his taxes. However, this evidence was deliberately ignored at trial. The reason for its non-disclosure was that the attorney who was retained to resolve the matter was negligent, careless and irresponsible. After Werner assured Susan Hall, Robert Adelman and his client, James Mitchell that he had resolved this matter, and there would be no further difficulties, Mitchell was subsequently indicted. In return for a $3,000.00 fee, the parties relying upon expert counsel, received meaningless and unfounded conclusions.

Your deponent as a member of the bar of the State of New York and authorized to practice in the Federal Courts, is well aware of the nature of the allegations set forth herein. With this in mind I refer to the case of Campbell v. United States 377 F.2d 135, 136 (C.A.D.C. 1966) wherein it was held that:

> High standards of professional courtesy and etiquette between members of the bar are important elements of an efficient system of justice, but if a duty to the client and deference to a professional colleague come into conflict, plainly, the latter must yield to the former.

Due to the nature of the charges, there are constitutional considerations as well. Both the 14th and 6th amendments dictate the necessity of being represented by able counsel.

In addition, it is further submitted that this court is the proper forum to hear the issues raised herein.

> Thus, when a claim of ineffective assistance is contemplated, it should first be presented to the district court in a motion for a new trial. In such proceeding, evidence dehors the record may be submitted by affidavit, and when necessary the district judge may order a hearing or otherwise allow counsel to respond.

United States v. Hinkle 487 F.2d 1197, 1200 - 1201, (C.A.D.C.1973).

For the purposes of this motion, it is essential that the facts of this case be distinguished from the case of a party knowingly and deliberately rejecting a course of procedure which at the time appears to be his best interest, and after an adverse decision is rendered seeks to obtain retrial according to a procedure which was voluntarily waived. See: United States v. Cook 432 F2d 1093 (C.A.D.C. 1970) cert. den. 401 U.S. 996 (197). The fact pattern herein, involves a deliberate plan of action by attorneys designed to thwart the best interests of their client. Under no circumstances did the defendant voluntarily waive or relinquish the right to disclose the true facts of this situation.

This motion was brought as soon as I was able to ascertain the complete situation, and communicate these facts to my client herein.

In addition to the affidavits of Mitchell and Hall, annexed hereto, I had also expected to include one in the name of Robert Adelman, as well, in further support. However, due to his demanding itinerary, Mr. Adelman has been unavailable. Due to the telephone conversations I had with him I may state that the nature of Mr. Adelman's affidavit if set forth, would reveal once again Mitchell's prior good intentions in retaining counsel. In addition, Mr. Adelman has informed me that he too was advised by William Werner, Esq. that the Mitchell tax problem was resolved and that there would be no further difficulty whatsoever. Mr. Adelman has assured me that if necessary, he will submit an affidavit to these facts, and/or testify under oath at a hearing to determine whether a new trial should be granted. If in the event a new trial is granted, Adelman would testify at such a trial, once again. There has been no previous application for this or similar relief before any court of competent jurisdiction.

WHEREFORE, it is respectfully prayed that this court, through its equitable powers, grant a hearing pursuant to Rule 33 of the Federal Rules Criminal Procedure, to more fully question the law and facts set forth herein.

RICHARD C. STEIN

Sworn to before me this
19th day of August, 1974

JOHN D. LaDUCO
Notary Public, State of New York
[illegible]
Qualified in [illegible] County

PRAIRIE HOUSE, INC.
115 FIFTH AVENUE
NEW YORK, NEW YORK 10003

No. 446

May 10 19 73 1-2/210

Pay to the order of Bandler & Kerr 3rd $ 3,000.—

Three Thousand and 00/100 Dol

Morgan Guaranty Trust Company OF NEW YORK
ROCKEFELLER CENTER OFFICE

PAID
MORGAN GUARANTY TRUST COMPANY
MAY 11 19
NEW YORK

Lisa Hall

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647

THIS CHECK IS IN PAYMENT OF THE FOLLOWING ACCOUNT
ENDORSEMENT BY PAYEE CONSTITUTES RECEIPT IN FULL
IF INCORRECT PLEASE RETURN

| DATE | PARTICULARS | AMOUNT | |
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA : | AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION PURSUANT TO RULE 33, FEDERAL RULES OF CRIMINAL PROCEDURE |
| - v - : | |
| JAMES MITCHELL : | |
| | 74 Cr. 265 |

STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK)

JEROME L. MERIN, being duly sworn and deposed, says:

1. I am a Special Attorney, United States Department of Justice, Organized Crime and Racketeering Section, assigned to the Southern District of New York Joint Strike Force.

2. This matter was tried before the Honorable Richard Owen, sitting without a jury, and a verdict of guilty as to defendant JAMES MITCHELL was returned on July 9, 1974. The case was handled by Special Attorney Charles E. Padgett of my office and Mr. Padgett remains as attorney in charge of this case.

3. Mr. Padgett is currently on military-annual leave and I have been assigned to represent the United States in these instant proceedings.

4. I have reviewed the evidence and indictment in this matter as well as the affidavits of JAMES MITCHELL, SUSAN HALL and RICHARD C. STEIN.

5. Defendant MITCHELL was indicted in 74 Cr. 265 for wilful evasion of Federal income taxes and wilful failure to file Federal income tax returns for the tax year 1971. Having been convicted on all charges, defendant and his business associate, SUSAN HALL, now submit affidavits urging this Court to grant a new trial. HALL and MITCHELL charge misconduct by MITCHELL'S defense attorneys as

well as newly discovered evidence. The information in the HALL and MITCHELL affidavits is submitted in support of an argument that MITCHELL lacked the requisite wilful intent, in the tax year in question, to be guilty of the crimes charged.

6. Defendant cannot claim that the alleged evidence showing non-wilfulness was newly discovered since both defendant, himself, and SUSAN HALL, a close associate of defendant's since at least 1971, were well aware of any alleged efforts to solve defendant's tax problems.

7. Assuming, arguendo, the truthfulness of the HALL and MITCHELL affidavits, the affidavits still fail to provide any exculpatory evidence. Indeed the MITCHELL and HALL affidavits add further evidence of knowledge and wilfulness on the part of the defendant MITCHELL.

8. Whether or not MITCHELL sought to have his tax problems resolved in May of 1973, after he was told of an Internal Revenue Service investigation, has no bearing on his actions or wilfulness in 1971 and up until April 15, 1972. Only after being told of the investigation, did MITCHELL and HALL go to the law firm of Bandler and Kass. See: HALL Affidavit at 3. The affidavits of HALL and MITCHELL do establish, however, Mr. MITCHELL spoke extensively with attorneys as to tax avoidance in July, 1972 (HALL Affidavit at 2, MITCHELL Affidavit at 2).

9. The Affidavit of SUSAN HALL contains internal factual conflicts as well as factual conflicts with the affidavit of JAMES MITCHELL, and for this reason, as well as her close and partisan association with defendant, her affidavit is of little reliability. Furthermore, HALL'S belief in MITCHELL'S intentions would have been inadmissable in any event.

10. Defendant MITCHELL, was not a passive observer at his trial and, indeed, took the stand to charge prosecutorial misconduct. It is hard to believe that he was the blind victim of his own, retained counsels' alleged chicanery and that he tolerated his counsels' lack of competence for well over a year-in the company of HALL and his own corporate attornies.

11. Even if defendant's statements were true, evidence that MITCHELL went to a tax lawyer after he was told he was being investigated would have been inadmissable at defendant's trial since such evidence would have been irrelevent and immaterial.

12. For the reasons set forth above, the United States respectfully urges that defendant's motion be denied as frivolous.

JEROME L. MERIN
Special Attorney
United States Department
of Justice

Sworn and subscribed before me
on this 26th day of August 1974.

CARL M. BORNSTEIN
Notary Public, State of New York
No. 31-0539828
Qualified in New York County
Commission Expires March 30, 19[illegible]

651

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | : | |
| - v - | : | 74 Cr. 265 |
| JAMES MITCHELL | : | |

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION MADE PURSUANT TO RULE 33, FEDERAL RULES OF CRIMINAL PROCEDURES

Defendant MITCHELL, having been convicted of income tax evasion and wilful failure to file income tax returns for the year 1972 urges this Court to grant a new trial pursuant to Rule 33, Federal Rules of Criminal Procedure.

Defendant's "newly discovered evidence" requires no such remedy since even if believed it establishes neither defendant's innocence nor his attorneys incompetence. Defendant's offer of proof, in support of his motion, fails to show that reliable, newly discovered evidence exists and that such evidence was not available at the time of trial. United States v. Fistel, 460 F2d 157 (2d Cir. 1972); United States v. Franzese, 321 F.Supp. 993 (S.D.N.Y. 1970), aff'd.,

Furthermore, HALL'S belief in MITCHELL'S intentions would ... been inadmissable in any event.

438 F2d 536 (2d Cir. 1970), cert. denied 402 U.S. 995; United States v. Pope, 415 F2d 685 (8th Cir., 1969). Indeed, the "newly discovered evidence" offered by defendant, even if true, is no evidence at all since MITCHELL'S efforts of May 9th and 10th 1973 were preceded by both his conference as to tax avoidance with Golub and Pravda, Esquires in July, 1972 and, with the aid of SUSAN HALL, his discovery on May 9, 1974, of the Internal Revenue Service investigation into his tax situation.

The general rule is that motions for a new trial are looked upon with disfavor. United States v. Pope, supra, at 691. The determination of whether or not a new trial is granted is for the Court. United States v. Polisi, 416 F2d 573, 576-77 (2d Cir. 1969). The tests adopted by this Circuit in determining a Rule 33 motion are set forth in United States v. Costello, 255 F2d 876 (2d Cir. 1958). See also: United States v. Franzese, supra, at 955-96. Under either test set forth in Costello, defendant's motion must fail since the "newly discovered evidence" offered would not have been admissable at trial since it lacks both relevence and materiality to the issues underlying the charges against MITCHELL.

Furthermore, HALL'S belief in MITCHELL'S intentions would ... been inadmissable in any event.

For the above reasons, it is respectfully urged that defendant's motion, on its face, fails to establish the need for further proceedings pursuant to Rule 33. It is further respectfully urged that defendant's motion be denied.

Respectfully submitted,

Jerome L. Merin

JEROME L. MERIN
Special Attorney
United States Department
of Justice

Furthermore, HALL'S belief in MITCHELL'S intentions would have been inadmissable in any event.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

Criminal Action
No. 74 Cr. 265

- against -

JAMES MITCHELL,

Defendant.

AFFIDAVIT

- - - - - - - - - - - - - - - - - - - - - - - - - -X

STATE OF NEW YORK )
ss.:
COUNTY OF NEW YORK )

WILLIAM J. WERNER, being duly sworn deposes and says:

1. That he is an attorney at law and a partner in the firm of BANDLER & KASS, ESQS.

2. That he is fully familiar with the facts and circumstances of this matter.

3. That the Department of Justice of the United States of America has provided your deponent with a copy of an Order to Show Cause brought by the Defendant in the above-entitled proceeding for an Order pursuant to Rule 33 of the Federal Rules of Criminal Procedure directing a new trial be granted herein.

4. That upon examination of the supporting affidavits annexed to said Order to Show Cause, your deponent ascertained that there were a number of misstatements of fact relative to the representation of the Defendant by your deponent's firm.

5. Although I can sympathize with the reasons the Defendant has to make the current application pending before the Court, I cannot in good conscience permit his spurious allegations to go unanswered. It is regretable that Defendant's new counsel, in a desperate attempt to avoid the consequences of Defendant's conviction, has been forced to try to place the blame on your deponent and his firm, who formerly represented said Defendant.

6. My firm was not retained by the Defendant until after he was aware that he was the subject of a criminal investigation by the Intelligence Section of the Internal Revenue Service. At the time of our retainer, I advised the Defendant that I would make every effort to effectuate a civil settlement of his tax obligations, but that this would be extremely difficult because of the fact that Defendant had never filed any income tax returns and denied any income whatsoever other than several thousand dollars from the book, "Gentlemen of Leisure." The Defendant inferred to me that he was a pimp. I advised him that if the Government could prove that he had income as a pimp which he had not reported, that he would be most certainly indicted for income tax evasion and probably convicted.

7. The agreed retainer in this matter was $5,000.00, pursuant to which I agreed to contact the Special Agent from the Intelligence Section of the Internal Revenue Service, attempt to dissuade him from recommending criminal proceedings

was not successful, we agreed to represent the Defendant in the event he was indicted. The Defendant paid my firm a total of $3,500.00, which included our representation of him during the trial of the instant proceedings.

8. After the retention of my firm by the Defendant, I immediately contacted Special Agent Rothenberger of the Internal Revenue Service and met with him in my office some time during or about June 1973. Mr. Rothenberger advised me that the Government was investigating the Defendant for possible criminal evasion of income tax and that the basis of this investigation was the book, "Gentlemen of Leisure;" and the possible activities of the Defendant as a pimp. He questioned me concerning income of the Defendant other than from the book, "Gentlemen of Leisure" and I advised him that, although, as far as I knew, there was no other income, the Defendant was prepared to work out a plan of payment, if a tax deficiency was found. Mr. Rothenberger indicated that there could be no discussions concerning any plan of payment or settlement with respect to a tax deficiency until his investigation was completed to determine whether or not there was any criminality in the situation.

9. I advised the Defendant of the results of this discussion and told him that we would have to wait until Special Agent Rothenberger concluded his investigation. I further advised him that if the Special Agent found no criminal tax liability, it would be returned to the Field Audit Division

Special Agent determined that there would be criminality, that he, the Defendant, could expect to be indicted, which indictment, if handed down, would preclude a civil settlement at that time, since same might involve admissions which would affect the outcome of any criminal proceeding.

10. I never stated to the Defendant that his "tax problems were resolved" or that "there is nothing to worry about, negotiations are almost complete."

11. In my opinion, it would have been disastrous to the interests of the Defendant to try to file a tax return in his behalf after our retainer, since obviously the Defendant was not prepared to admit his true voca ion and sources of income. This would necessarily have required the filing of a false tax return which would, of course, be unthinkable.

12. When the Defendant was indicted and arrested, our firm undertook to fulfill its obligations to the Defendant by representing him in the defense of the charges brought against him, despite the fact that he never paid us the balance of the fee agreed upon. Our investigation of the indictment and our discussions with the United States Attorney in charge of the case indicated a high degree of probability of conviction and we so indicated same to the Defendant. After a number of discussions, the Defendant agreed that the best possible course of action was to plead guilty to one (1) count of the indictment, which the United States Attorney agreed to accept. On the morning when the matter was called for the purpose of accepting the Defendant's plea of guilty, the Defendant advised me that

he had changed his mind and wanted to go to trial. I so informed the Court and it ordered that the trial proceed forthwith.

13. It is respectfully submitted that I, at all times, conscientiously and with the best degree of professional skill of which I am capable, represented the Defendant in this matter. Unfortunately, the Defendant was convicted and is now reaching in desperation for some basis upon which to obtain a new trial. Although I understand his plight, I must strongly resent the charges made against me and my firm, none of which have any basis in fact.

William J. Werner

Sworn to before me this
28th day of August, 1974.

Notary Public

DON B. PANUSH
Notary Public, State of New York
No. 41-0207665
Qualified in Queens County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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member of the Ethics Committee of Bronx County Bar Association for a number of years and I am presently a member of the Ethics Committee of the New York State Trial Lawyers Association.

5. In my opinion, the charges made against my firm in the affidavit of Richard C. Stein, as aforesaid, constitute a libel and a complete disregard of the ethical responsibilities of an attorney. It is unconscionable that Mr. Stein, under the cloak of privilege of some sort, should be able to charge your deponent and his firm with "devising a trial strategy, that was designed not to advance or promote the interests of his client, but rather was conceived to protect the reputation of his firm" and to accuse your deponent's partner, WILLIAM J. WERNER, of negligence.

6. It is respectfully submitted and requested that the Court refer this entire matter to the Bar Association for investigation and disciplinary action. If Mr. Stein's charges were true, I do not deserve to be a member of the Bar. On the other hand, if his charges are willful and malicious, in addition to being unfounded, he should certainly be subjected to some sort of disciplinary action. I cannot justify his horrendous accusations by virtue of his zeal to perform a service for the Defendant herein.

7. On the morning of the trial herein, I was called by Mr. Werner at home where I had been confined to bed, ill. I was advised by Mr. Werner that the Court had ordered the trial to proceed immediately and that it would be a dis-

service to the Defendant if we could not give him the best possible representation with respect to his defense, since I was the senior trial attorney in our firm. I proceeded immediately to the Court despite the fact that it was a severe personal hardship to me in that I was experiencing pain and was under sedation. I so advised the Court of this and the Defendant.

8. Before the actual commencement of the trial, I discussed with the Defendant the possibilities of acquittal or conviction in his case, which in my opinion depended to a large extent on whether or not the witness, Susan Hall, would continue to exert her privilege against testifying by virtue of her rights as a journalist. I further advised him that in the event that she did testify, the possibility of conviction was a high one, since this would corroborate the testimony of a prostitute who was going to testify concerning income of the Defendant earned in his capacity as an alleged pimp. The Defendant had been assured by Miss Hall and her attorney that she was not going to testify and on that basis had decided to proceed to trial. We further advised the Defendant that in our opinion it would be suicidal for him to take the stand and to expose himself to cross-examination. Likewise, we felt that Mr. Werner could not take the stand in the Defendant's behalf without waiving the attorney-client privilege, which would have made a conviction a certainty because of certain confidential communications directed to Mr. Werner by the Defendant and Susan Hall.

9. The trial in this matter took three days. At the conclusion of the trial, the Court reserved decision. The Defendant, in open Court, thanked Mr. Werner and myself for the efforts we had expended in his behalf and indicated that in his opinion we had done a "terrific job." He was, of course, concerned about the fact that Susan Hall had reneged on her promise to him not to testify, but felt that because of the way the trial had been conducted that he had been afforded the best possible chance of an acquittal.

10. My only concern during the trial of the action was the interest of the Defendant. I cannot comment on my own expertise, except to state that in twenty-five years of trial practice, I have never been charged with neglect, incompetence or any course or activity not in the best interest of my client, nor have I been guilty of same. I gave this Defendant the best I could offer within the limits of my capability and experience and the standard of ethics which I feel to be the responsibility of each attorney at law admitted to practice in this country. It is regrettable that Defendant's new attorneys do not adhere to this standard of ethics.

William C. Sherr

Sworn to before me this
7th day of August, 1974.

Notary Public

ELIZABETH ANNE BURKE
Notary Public, State of New York
No. 31 5528625
Qualified in New York County
Commission Expires March 30, 1976